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NO. 84-

In The
Supreme Court Of The United States

OCTOBER TERM, 1984

STEVEN ASHERMAN
Petitioner

v.

STATE OF CONNECTICUT
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

1. The jury's consultation of a dictionary definition of inference during deliberation violated the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

2. The jury's performance of unreliable experiments using articles of clothing smuggled into the deliberations room violated the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

3. The trial court instructed the jury that "every person is presumed to intend the natural and necessary consequences of his or her acts" in violation of the Fourteenth Amendment to the United States Constitution.

4. The trial court restricted the defendant's cross examination of expert witnesses with respect to bias interest or prejudice and with respect to the accuracy of an opinion, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

5. The trial court instructed the jury with respect to a charge for which there was no evidence in violation of the Fourteenth Amendment to the United States Constitution.

6. The introduction of results of tests performed on a destroyed blood sample, not available to the defendant, violated the Fourteenth Amendment to the United States Constitution.

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No. 84-

IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN M. ASHERMAN

v.

STATE OF CONNECTICUT

The petitioner, Steven M. Asherman, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut entered in this proceeding on September 26, 1984.

REPORTS OF OPINIONS

The official opinion of the Supreme Court of Connecticut is reported at 193

Conn. 695 (1984). The unofficial report is published at 478 A2d 227 (1984). The summary denial of the petitioner's motion to reargue is unpublished and appears in the Appendix hereto.

The trial court issued unpublished, written opinions on the petitioner's motion to suppress and motions for new trial and on the state's motion for nontestimonial evidence. The opinions appear in the Appendix hereto.

JURISDICTION

(i) The decision of the Supreme Court of Connecticut was released on July 17, 1984.

(ii) The Supreme Court of the State of Connecticut denied the petitioner's motion to reargue on September 26, 1984.

(iii) The petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(3).

PROVISIONS OF CONSTITUTION, STATUTES AND RULES INVOLVED

(i) United Sta es Constitution, Fourth Amendment:

(ii) United States Constitution, Fifth Amendment:

(iii) United States Constitution, Sixth Amendment:

(iv) United States Constitution, Fourteenth Amendment:

(v) Connecticut General Statutes, Section 53a-54a.

(vi) Connecticut General Statutes, Section 53a-55.

(vii) Connecticut Practice Book, 1978, Section 758.

(viii) Connecticut Practice Book, 1978, Section 759.

STATEMENT OF THE CASE

STATEMENT OF FACTS

On the morning of July 30, 1978, on Jones Mountain in New Hartford, Connecticut, the body of Michael Aranow was discovered, dead as a result of multiple stab wounds.

Earlier that morning, Steven Asherman had reported Aranow missing. He reported to Frank Jones, Aranow's uncle, that he and Aranow had arrived in New Hartford after dark on the previous evening and had walked along a trail toward a place described by Aranow as "the Lookout". Asherman and Aranow were medical students in the same class and had long been close friends. They were taking a respite from their studies by visiting Jones Mountain, a place familiar to Aranow but unknown to Asherman. Asherman reported that he and Aranow were confronted along the trail by two drunken, armed and belligerent men. Asherman and Aranow fled into the woods and were separated. Asherman became lost in the darkness. After

daybreak, he found his way to the Jones' house.

Evidence indicated that Aranow died of multiple stab wounds, consistent with the use of two weapons; one weapon was likely to have been a heavy bladed instrument such as an axe. An exhaustive search of the area failed to uncover any weapons. Asherman had with him only a small day-pack which he lost some time after he was separated from Aranow; the search also failed to produce the pack. At trial, one witness testified that, on the morning of Aranow's death, she gave a hitchhiker who appeared nervous and apprehensive and whose clothing appeared blood soaked.

After Asherman was taken into custody, a set of keys were seized from his pants pocket. An officer noticed a hair stuck in crusty-like material on a key. The keys and key ring were transferred, unprotected, in an envelope contained in a box with other items, all of which were loosely packaged. A substance on the key ring was determined to be blood; it was consumed by the testing. A broken hair removed from the key ring could have originated from Aranow's head. No one could explain how the blood and hair could have migrated from the key to the key ring.

Pictures taken at the autopsy were introduced and expert testimony presented to identify marks on Aranow's body as bite marks. The state's

forensic odontologist, Dr. Luntz, testified that in his opinion the bite marks were caused by Asherman. Luntz based his opinion upon comparison of impressions and photographs of Asherman's teeth with photographs of Aranow's body. Identifying bite marks involves the use of generally accepted techniques, many of which were not utilized in this case. The autopsy photographs were distorted. Forensic odontologists called by the petitioner testified that "to a reasonable degree of dental certainty, to the point of absolute certainty, [Asherman's] teeth could have in no way made this mark." Dr. Sopher, called by the state in rebuttal, testified that the petitioner

could not be excluded from the class of those who might have inflicted the mark.

The trial court restricted the cross-examination of Luntz and of Sopher, concerning relationships between the two experts and between Luntz and law enforcement agencies, and concerning the accuracy of Luntz's methods.

A jury of twelve rendered a verdict of guilty of manslaughter. Subsequently, jurors testified at a hearing concerning acts of misconduct. During deliberations, Juror Streib read to the jury a Funk & Wagnall's definition of "inference" which included "3. loosely, a conjecture". Jurors Henry and Turner described experiments performed by using a shirt and belt smuggled into the deliberation room.

Juror Turner had concealed a cut-off shirt and a belt in a bag of apples and carried them. To test the claim of the State that Asherman, alone, could have carried Aranow, one juror put on the belt and shirt while another attempted to lift him. The first try was unsuccessful. The second was not. Neither the shirt nor the belt were in evidence. In fact, there was no evidence that Aranow had been wearing a belt. Aranow's shirt was not cut off; it was a full trial exhibit.

STATEMENT OF PROCEEDINGS

On October 31, 1978, the defendant was indicted for murder, in violation of

Connecticut General Statutes, Section 53c-54a(a).

By pretrial motion, the defendant requested the production of blood samples for testing by his expert. The request is set forth as Appendix B. During the presentation of the state's evidence, the trial court admitted a set of keys and a hair sample into evidence, over the defendant's objection. The trial court permitted a state's witness to testify that he found blood on the key ring and hair. The defendant moved to strike the testimony and the exhibits. The trial court's decision is set forth as Appendix C. The question was presented on appeal.

The state called Dr. Luntz and Dr. Sopher as expert witnesses. During the

cross-examination of each, the trial court restricted the defendant's inquiry and the defendant excepted to the rulings. The defendant's questions and the court's rulings are set forth as Appendix D and Appendix E. The questions were presented on appeal.

The trial court instructed the jury concerning a presumption of intent. The court's instruction is set forth as Appendix F. The defendant raised the question in his motion for new trial; the trial court's decision is set forth as Appendix G. The question was presented on appeal.

The trial court instructed the jury concerning the lesser-included offense of manslaughter. The court's instruction is set forth as Appendix H.

The defendant took exception to the instruction and raised the question in his motion for new trial; the trial court's decision is set forth as Appendix G. The question was presented on appeal. The defendant's claim under the equal protection clause of the Fourteenth Amendment was addressed in his motion to reargue.

The jury, during its deliberations, consulted a dictionary definition of the term "inference". The jury also imported a shirt and belt, not in evidence, into the deliberation room for an experiment. The defendant moved for a new trial; the trial court's written decision denying the motion is set forth as Appendix I. The question was presented on appeal.

REASONS FOR ALLOWANCE OF WRIT

1. JURY'S CONSULTATION OF DICTIONARY

A. The use of a dictionary, by the jury, to define the term "inference", constituted a violation of the due process guarantee of the Fifth and Fourteenth Amendments to the United States Constitution.

In consulting an ordinary dictionary for the meaning of the term "inference", the jury invaded the function of the court

"Ad questionem facti, non respondent judices, ad questionem juris, non respondent juratores." Isaack v. Clark, Rolle 1, 132, 2 Bulstr. 314 (1613-14). The jury shall decide issues of fact, the Court shall decide the law.

The division of functions within the courtroom was recognized in early common law. That division forms a basic element of trial by jury. The same division of functions was accepted by the drafters of the Constitution and became a part of the Constitutional guarantee of due process.

> "Tribunals for the trial of crimes were intended to be constituted as all common law tribunals in which trial by jury was practiced were constituted, having one or more judges who were to preside at the trials and form one part of the tribunal, and a jury who were to form the other part." United States v. Morris, 1 Curtis C.C.R. 23, 49 (1st Cir. 1851).

The division is reflected in Connecticut law:

> "The court shall decide all issues of law and all questions of law arising in

> the trial of criminal cases...otherwise the court shall submit the facts to the jury without directing how to find their verdict." Connecticut General Statutes, Section 54-89, Connecticut Practice Book, 1978, Section 855.

It is fundamental that the court shall decide the law and state the law to the jury, and that the jury shall apply that law to the facts as the jury finds them. The jury are a coordinate branch of the tribunal having their appropriate powers, rights and duties, but it is not within their province to decide any question of law. United States v. Morris, supra at 61, United States v. Riley, 5 Blatch, C.C. 204, 206 (S.D.N.Y. 1864).

The evidence at trial was primarily circumstantial. A case of

circumstantial evidence depends upon the drawing of inferences to establish guilt. Accordingly, the jury was instructed on the drawing of inferences from circumstantial evidence.

Although the drawing of inferences is within the province of the jury, the definition of the term "inference" as it is applied in the law, is not.

The Connecticut Court failed to acknowledge the distinction, recognized within the cases upon which it relied, between commonly known words and words having a particular meaning within the law. "Inference" has a particular legal meaning, as does "reasonable" in the phrase "reasonable doubt", Alvarez v. People, __Colo__ 653 P.2d 1127 (1982), "circumstantial evidence", State v.

Holmes, 17 Ore. App. 464, 522 P. 2d 900 (1974), or "undue influence", Schultz v. State, 417 N.E. 2d 1127 (Ind. App. 1981).

In this case, the jury invaded the province of the court, denying the defendant the protection of due process of law as guaranteed by the Constitution of the United States.

B. The jury further denied the defendant due process of law by relieving the State of the burden of proving guilt beyond a reasonable doubt.

A defendant in a criminal case is protected against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Jackson v.

Virginia, 443 U.S. 307, 315 (1979), In re Winship, 397 U.S. 358, 374 (1970).

Inferences may be drawn by the trier of fact from other facts which have been proven. However, the inference must be a reasonable deduction; it is not enough that the inferred fact possibly follows from the proven fact. State v. Foord, 142 Conn. 285, 294 (1955). Fitch v. State, 138 Conn. 534 (1952). State v. Schoenbneelt, 171 Conn. 119, 126 (1976). The inference drawn must be strong enough that it is more probable than not that the fact to be inferred is true. Hennessey v. Hennessey, 145 Conn. 211, 214-15 (1958). A conclusion based on conjecture or speculation is not a

product of due process of law. State v. DeCoster, 147 Conn. 502, 504 (1960).

The definition derived from Funk & Wagnall's Dictionary included:

"3. loosely, a conjecture."

By indicating to themselves that inferences could be drawn as conjecture or surmise, the jurors greatly reduced the quantum of proof required to convict the defendant and relieved the State of the burden of establishing guilt beyond a reasonable doubt.

C. The jury deprived the defendant of the assistance of counsel, as guaranteed by the Sixth Amendment to the Constitution of the United States.

The time of instruction to the jury is a critical juncture in the course of

a trial. State v. Ralls, 167 Conn. 408, 419-20 (1974). Since the jury is bound to apply the law as instructed, it is essential that the instructions conform to the law. Counsel is afforded the opportunity to request instructions and to take exception to the instructions as a means of assuring the propriety of the instruction. Fillipon v. Albion Vein Slate Co., 250 U.S. 76, 81 (1919), Shields v. United States, 273 U.S. 583 (1927).

In this case, counsel had no opportunity to take exception to the definition, and no opportunity to argue that a corrective instruction ought to be given.

The definition of inference, supplied to the jury out of the presence

of the Court, and of counsel, deprived the defendant of the assistance of counsel at a crucial moment in the trial, in disregard of the defendant's Constitutional rights.

2. JURY'S USE OF EXTRANEOUS EVIDENCE

The introduction by the jury of evidence not admitted at trial and the performance of experiments by the jury during deliberation denied the defendant the rights of confrontation, of the assistance of counsel, and of cross-examination guaranteed by the Sixth Amendment to the United States Constitution.

The jury misconduct also denied the defendant his right to a trial by an impartial jury as guaranteed by the Sixth Amendment and denied him the

opportunity for a fair trial inherent in the guarantee of due process of law of the Fifth and Fourteenth Amendments to the United States Constitution.

During the deliberations, a juror smuggled a shirt and a belt, concealed in a bag of apples, into the jury room for use in experiments. The defendant had no opportunity to be confronted with the items, or with the results of the experiment. The defendant had no opportunity to test the evidence or to question the premises, the methods or the results of the experiment.

Inherent in the rights of confrontation and of counsel is the right of cross-examination. Chambers v. Mississippi, 410 U.S. 284, 295 (1973). It is an essential and fundamental

requirement of a fair trial and invaluable in assuring the accuracy of the truth-determining process. Id. Cross-examination cannot be had except by the direct putting of questions and obtaining immediate answers. 5 Wigmore Evidence, § 1395 (Chadbourne Rev. 1970).

By examining the items not introduced into evidence, and by engaging in the experiment, the jurors became witnesses against the defendant possessed of certain circumstantial evidence who should have been called as witnesses and been subjected to proper cross-examination before the evidence could be allowed to play a part in the verdict. See 6 Wigmore, Evidence, §§ 1800, 1802 (Chadbourne Rev. 1970).

It is fundamental to a fair trial, by an impartial jury, that no evidence reach the jury unless it be introduced in open court. Turner v. Louisiana, 379 U.S. 466, 472-73 (1965). Parker v. Gladden, 385 U.S. 363, 364 (1966). The right to a trial by an impartial jury lies at the very heart of due process. Irvin v. Dowd, 366 U.S. 717, 721-22 (1961). The jurors' oath required no less. See Connecticut General Statutes, Section 1-25. Evidence introduced at trial is subject to the safeguards of judicial scrutiny as well as the scrutiny of the defendant exercising his rights of confrontation and cross-examination. Where such tainted evidence reaches the jury, their verdict must be set aside if due process is to

be guaranteed. Turner v. Louisiana, supra.

The experiments conducted by the jury were more than a mere application of everyday experiences, although the items used were everyday items. The jurors' need to perform the experiment indicates that the results were beyond their own experience. People v. Brown, 48 N.Y. 2d 388, 399 N.E. 2d 51 (1979). Furthermore, the items used differed substantially from the evidence and rendered the experiments unreliable.

3. PRESUMPTION OF INTENT INSTRUCTION

The trial court erred in instructing the jury that "every person is presumed to intend the natural and necessary consequences of his or her acts". The instruction shifted the

burden of proof and enabled the jury to find intent absent proof beyond a reasonable doubt, in violation of the Fourteenth Amendment to the United States Constitution.

The defendant was charged with the crime of murder and convicted of manslaughter. Both involve intent as a necessary element. Connecticut General Statutes, Section 53a-54a, and Section 53a-55. The Court properly charged the jury that, in order to find the defendant guilty of either murder or manslaughter, they must first find the requisite intent, beyond a reasonable doubt, from facts established by the State. In re Winship, supra, Sandstrom v. Montana, 442 U.S. 510, 524 (1979).

However, the Court's charge that "every man is presumed to intend the natural and necessary consequences of his or her acts" provided the jury with a means of finding the necessary element of intent without evidence. Sandstrom v. Montana, supra.

The Court's charge was phrased in terms of a presumption. A presumption is an evidentiary device which enables a fact-finder to establish an 'ultimate' fact from the proof of a different, 'basic' fact. Ulster County Court v. Allen, 442 U.S. 140, 157 (1979). To presume a fact is to "take or assume [that fact] beforehand, without proof." Morford v. Peck, 46 Conn. 380, 385 (1878) (emphasis supplied). A presumption will be constitutionally

invalid if it affects the strength of the reasonable doubt standard, or if it places the burden of proof upon the defendant. In re Winship, supra, Ulster County Court v. Allen, supra. Sandstrom v. Montana, supra at 523-24.

A reasonable juror could give the presumption either conclusive or persuasion-shifting effect. It cannot be discounted that the jurors in this case actually proceeded upon one or the other interpretation. Sandstrom v. Montana, supra at 519.

The instruction used by the trial court is similar to the instruction invalidated in Sandstrom v. Montana. The instruction is identical to the instruction given in Moye v. Connecticut, 444 U.S. 983 (1979); in

Moye, the judgment of the Connecticut court was vacated and the case remanded for further consideration in light of Sandstrom. On remand, the Connecticut Supreme Court ordered a new trial. State v. Moye, 179 Conn. 761 (1979). Nevertheless, in this case, the Connecticut Supreme Court failed to follow either Sandstrom or Moye. Furthermore, the Connecticut Court has consistently failed to follow the Sandstrom rule except in the most egregious circumstances. Compare, State v. Arroyo, 180 Conn. 171 (1980), State v. Perez, 181 Conn. 299 (1980), State v. Maselli, 182 Conn. 66 (1980), State v. Harris, 182 Conn. 220 (1980), State v. Vasquez, 182 Conn. 242 (1980), State v. Brokaw, 183 Conn. 29 (1981), State v.

Gunning, 183 Conn. 299 (1981), State v. Stankowski, 184 Conn. 121 (1981), State v. Pina, 186 Conn. 261 (1982) State v. Cosgrove, 186 Conn. 476 (1982), State v. Mason, 186 Conn. 574 (1982), State v. Miller, 186 Conn. 654 (1982), State v. Orsini, 187 Conn. 264 (1982), State v. Vitale, 190 Conn. 219 (1983) with State v. Harrison, 178 Conn. 689 (1979), State v. Theriault, 182 Conn. 366 (1980), State v. Johnson, 185 Conn. 163 (1981), Turcio v. Manson, 186 Conn. 1 (1982).

4. RESTRICTION OF CROSS-EXAMINATION

The limitations imposed upon the cross-examination of the state's expert witnesses constituted a denial of his right to confront and cross-examine the witnesses against him, in violation of

the Sixth and Fourteenth Amendments to the United States Constitution.

The Sixth Amendment right of an accused to be confronted with the witnesses against him is secured for defendants in state criminal proceedings. Pointer v. Texas, 380 U.S. 400 (1965). The primary interest secured by the right of confrontation is to secure the opportunity of cross-examination. , Douglas v. Alabama, 380 U.S. 415 (1965), 5 Wigmore, Evidence, § 1395 (Chadbourne Rev. 1970). Cross-examination is the principle means by which the credibility of a witness and his testimony may be tested. Davis v. Alaska, 415 U.S. 308,316 (1974). Cross-examination involves not only testing the witness' perceptions and

recollection, but also involves the opportunity to reveal biases, prejudices or ulterior motives of the witness as they may relate to the issues or personalities of the cause. Davis v. Alaska, supra at 316.

The testimony sought to be elicited from the two dental experts may be separated into two general categories. First, the defendant sought to examine the relationship between Dr. Luntz and law enforcement agencies and the relationship between Dr. Sopher and Dr. Luntz. Second, the defendant sought to examine the accuracy of Dr. Luntz' opinion in a prior case involving similar facts and similar methods of evaluating evidence.

Partiality of mind, whether from bias, prejudice or interest, is always relevant as discrediting a witness. Davis v. Alaska, supra at 316. 3 Wigmore, Evidence, § 940 (Chadbourne Rev. 1970). Such partiality may arise from a relationship between the witness and a party or between witnesses. 3 Wigmore, Evidence, § 945, 949 (Chadbourne Rev. 1970). Partiality is any favor or friendly feeling and may arise from a social or business relationship. McCormick, Evidence, § 40 (2d Ed. 1972). Cross-examination to show bias, motive, interest or prejudice is a matter of right, the denial or undue restriction of which will constitute error. Davis v. Alaska, supra at 316

The defendant sought to elicit from Dr. Luntz information concerning the accuracy of a prior identification made by Dr. Luntz involving similar facts and similar techniques and methods. A defendant is permitted to expose to the jury facts from which the jurors could appropriately draw inferences relating to the reliability of the witness. Davis v. Alaska, supra at 316. When a special qualification is required by a witness, the lack of that qualification may be ascertained by evidence of specific instances of the witness' failure to possess or exercise it. 3 Wigmore, Evidence, § 991 (Chadbourne Rev. 1970). Questions relating to prior erroneous evaluations in similar instances may be put to the witness

himself. Id. The purpose of the inquiry is to test the accuracy and reasonableness of the witness' direct testimony, Floyd v. Fruit Industries, Inc., 144 Conn. 659, 667 (1957), or to expose the unreasonableness of his opinion. Livingstone v. New Haven, 125 Conn. 123, 128 (1939).

The defendant elicited testimony that Dr. Luntz had utilized the methods used in this case in evaluating other bite marks and had offered his opinion as to the origin of such bite marks in other cases. The similarities in both data and examination technique between the prior case and this case laid a foundation sufficient to establish that the facts in the prior matter bore a fair relation to the evidence in this

case. See Floyd v. Fruit Industries, Inc., supra at 666. The defendant sought to establish that the methods used by the expert in this case had, in a prior case, led the expert to an erroneous conclusion.

The trial court can only exercise its discretion to restrict the scope of cross-examination if the defendant has otherwise been permitted cross-examination sufficient to satisfy the constitutional threshold. State v. Gaynor, 182 Conn. 501, 508 (1980). The constitutional standard is met if the defendant is permitted to expose facts from which the jury could appropriately draw inferences relating to the reliability of the witness. Id., Davis v. Alaska, supra at 318. "Prejudice

ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and credibility to a test, without which the jury cannot fairly appraise them". Alford v. United States, 282 U.S. 687, 692 (1929), Smith v. Illinois, 390 U.S. 129, 132 (1968). Here, the defendant was denied an opportunity to impeach a key witness who may have had reason to cooperate with the state. United States v. Summers, 598 F.2d 450, 460 (5th Cir. 1979), United States v. Elliott, 571 F.2d. 880. 908 (5th Cir. 1978).

5. MANSLAUGHTER INSTRUCTION

The court's instruction enabled the jury to find the defendant guilty of an offense without evidence necessary to

the conviction, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The jury's verdict did not distinguish between manslaughter as set forth in Connecticut General Statutes, Section 53a-55(a)(2) (extreme emotional disturbance) or as set forth in Connecticut General Statutes, Section 53a-55(a)(1) (intent to cause serious physical injury). Where a person may have been convicted under more than one statutory alternative, the judgment cannot be supported unless there was evidence to support each alternative. Leary v. United States, 395 U.S. 6, 31-32 (1969). The trial court, in addressing the jury, concluded that no evidence of extreme emotional

disturbance existed. Furthermore, the evidence of extreme emotional disturbance upon which the state relied clearly does not establish the elements required under the standard set forth by the Connecticut Court. Compare State v. Asherman, 193 Conn. 695, 732, 733 (1984).

No evidence of an emotional disturbance, mental disease or mental defect is shown. Intoxication, even if established, is not equivalent to an emotional disturbance. See, State v. Zdanis, 182 Conn. 388 (1980), State v. D'Antuono, 186 Conn. 414 (1982). Evidence of a gruesome homicide is not sufficient to establish an emotional disturbance. State v. D'Antuono, supra. Lack of sleep, intoxication, and

agitation are not the equivalent of extremely unusual or overwhelming states. State v. Zdanis, supra, State v. D'Antuono, supra.

Furthermore, the Connecticut court has adopted a standard, in violation of the guarantees of equal protection of the laws, which requires a defendant to give notice of his intention to rely upon evidence of extreme emotional disturbance but permits the state to introduce and rely upon such evidence without prior notice. In State v. Marino, 190 Conn. 639, 651 n.11 (1983) and in State v. Asherman, supra at 731 n.10, in which the state successfully relied upon evidence of extreme emotional disturbance, the court indicated that no special plea, notice or other formal

assertion is required. Indeed, in both cases, the state gave no notice to the defendant and raised the issue only after the introduction of all evidence. Nevertheless, Connecticut law does require a formal notice from the defendant prior to trial. Connecticut Practice Book, 1978, Sections 758 and 759. Failure to provide such notice may preclude the defendant from raising the defense. Connecticut Practice Book, 1978, Section 758. Those provisions do not apply to the state. No rational justification exists for requiring the defendant to give advance notice without requiring the same of the state. Wardius v. Oregon, 412 U.S. 470, 475 (1973). The state cannot compel a defendant to disclose the details of his case without

being required, itself, to disclose similar details of its case. Id. at 475-76.

6. DESTRUCTION OF EVIDENCE

The introduction of the results of tests which were performed on the destroyed blood sample denied the defendant a fair trial, as guaranteed by the Fourteenth Amendment to the United States Constitution. The destruction of the evidence also denied him the opportunity of presenting evidence on his own behalf, in violation of the due process guarantee of the Fourteenth Amendment.

The determination of whether the destruction of evidence amounted to a deprivation of due process of law depends upon the materiality of the

missing evidence, the likelihood of mistaken interpretation of the evidence and the reason for its nonavailability. State v. Harden, 175 Conn. 315, 326-27 (1978). United States v. Herndon, 536 F. 2d 1027, 1029 (5th Cir. 1976).

Furthermore, the evidence must possess exculpatory value apparent before the evidence was destroyed and be a nature that the defendant would be unable to obtain comparable evidence by other means. California v. Trombetta, ____U.S.____, 81 L. Ed. 2d 413, 422, 104 S.Ct.____, (1984).

In this matter, the evidence was material to the question of the proximity of the defendant to the deceased. A hair of the deceased, embedded in blood on the defendant's key

ring would support an inference that the hair was deposited at the time the blood was fresh. But the defendant and the deceased were close friends and spent considerable time together. Both were medical students; both had clinical exposure to blood. Had the defendant been able to establish, through testing, that the blood on the key ring was not Aranow's blood, he would have defeated the inference that the hair was deposited at the time of Aranow's death.

The remedy for the destruction of the evidence is suppression of the government's testimony relating to that evidence. The blood consumed by the test could not be recreated for testing by the defendant. Since the defendant was deprived of the opportunity to

defeat the inference that the hair was deposited a the time of the decedent's demise, the government should not have been permitted to introduce evidence supporting the inference. Under such circumstances, the probative value of the evidence is substantially outweighed by the danger of prejudice to the defendant. United States v. Stabler, 490 F. 2d 345, 349 (8th Cir. 1974).

A heavy burden is placed upon the state to establish the need for evidence of tests performed on a substance destroyed by the state's testing. People v. Taylor, 54 Ill, App. 3d 454, 12 Ill. Dec. 76, 369 N.E. 2d 573, 576 (1977), People v. Dodsworth, 60 Ill, App. 3d 207, 17 Ill. Dec. 450, 376 N.E. 2d 449, 452 (1978). A criminal defendant is

entitled to an opportunity to have an expert of his choosing, subject to appropriate safeguards, examine physical evidence which may be subject to varying opinion. Connecticut Practice Book, 1978, Section 738. Bernard v. Henderson, 514 F. 2d 744, 746 (5th Cir. 1975). Fundamental fairness, inherent in the due process guarantee, is violated when the defendant is denied the opportunity to evaluate and rebut such adverse evidence. United States v. Owen, 415 F. 2d 383 (8th Cir. 1969).

7. CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Supreme Court of Connecticut.

Respectfully Submitted

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CLERK

In The

Supreme Court Of The United States

OCTOBER TERM, 1984

STEVEN ASHERMAN
Petitioner

v.

STATE OF CONNECTICUT
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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APPENDIX A

PROVISIONS OF CONSTITUTION, STATUTES AND RULES INVOLVED

(i) United States Constitution, Fourth Amendment:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated...

(ii) United States Constitution, Fifth Amendment:

No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of

life, liberty or property without due process of law...

(iii) United States Constitution, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him, ... and to have the assistance of counsel for his defence.

(iv) United States Constitution, Sixth Amendment:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty or property without due process of law, nor

deny to any person within its jurisdiction the equal protection of the laws.

(v) Connecticut General Statutes, Section 53a-54a.

(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be

determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person.

(vi) Connecticut General Statutes, Section 53a-55:

A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he committed the proscribed act or acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and

need not be proved in any prosecution initiated under this subsection; or (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.

(vii) Connecticut Practice Book, 1978, Section 758:

If a defendant intends to rely upon the defense of mental disease or defect at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions pursuant to Sec. 811 or at such later time as the judicial authority may direct, notify the prosecuting authority in writing of

such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this section, mental disease or defect may not be raised as a defense. The judicial authority may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(viii) Connecticut Practice Book, 1978, Section 759:

If a defendant intends to introduce expert testimony relating to a mental disease or defect, or another condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the

time provided for the filing of pretrial motions or at such later time as the judicial authority may direct, notify the prosecuting authority in writing of such intention and file a copy of such notice with the clerk. He shall also furnish the prosecuting authority with copies of reports of physical or mental examinations of the defendant made in connection with the offense charged, within five days after receipt thereof. The judicial authority may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

APPENDIX B

MOTION FOR DISCOVERY

The defendant moves pursuant to Sections 2142 et seq., Connecticut Practice Book, for an order directing and prosecuting authority, within a time set by the Court, to disclose in writing the existence of and allow the defendant to inspect, copy, photograph and to have reasonable tests made on any of the following relevant materials:

* * * * *

2. Books, tangible objects, papers, photographs or documents obtained from or claimed to belong to or used by the defendant including, but not limited to clothing, shoes, key rings,

finger nail scrapings, hair samples, belt with buckle, urine, knife, finger prints, and blood samples

Filed October 16, 1976

APPENDIX C

TRIAL COURT'S DECISION ON MOTION TO STRIKE EXHIBITS

THE COURT: I have some decisions to announce in this case. There is a motion to strike the testimony of the hair on the key ring. It is my ruling that there was merit to the defendant's argument in this case but the merit would go to the weight and not to the admissibility and so therefore the motion to strike is overruled. And I will take your exception.

MR. ALBRECHT: Yes. Just for the record so the record is clear, there was really -- the motion to strike was in

two parts, if you Honor recalls. One part was as to the consummation of the sample, that was the Stabler case, and the other part was as to the fact that -- the other fact was that the testimony as read to your Honor indicated that the hair was seen on the key and that there was testimony that the hair was seen on the key ring without explanation as to why the discrepancy.

I assume by your Honor's ruling that you have denied or overruled both of those motions.

THE COURT: That is correct.

MR. ALBRECHT: And for the record may I have an exception.

THE COURT: Your exception may be noted. (T. 2-3, July 18, 1979).

APPENDIX D

EXCERPTS OF INQUIRY OF DR. LUNTZ AND TRIAL COURT'S RULINGS ON OBJECTIONS

In the course of examining Dr. Luntz, the state's forensic odontologist, the defendant's trial counsel pursued the following inquiry:

Q And are you not a collector of police uniforms?

MISS DRANGINIS: Objection, your Honor.

MR. ALBRECHT: It goes to interest, your Honor.

THE COURT: Sustained.

MR. ALBRECHT: Your Honor, it goes to this man's interest and that is a

question for the Jury, his motive and his interest.

MISS DRANGINIS: The lecturing might possibly go to interest, your Honor, although I doubt it, but I don't think whether or not he collects uniforms has anything to do with this case.

THE COURT: I'll sustain the objection.

BY MR. ALBRECHT:

Q Doctor, are you not a collector of police badges?

MISS DRANGINIS: Objection, your Honor, same grounds.

MR. ALBRECHT: Your Honor, I want to demonstrate to the Jury what this -- how this man operates. And I think I

have a right to go into this particular area on his interest.

MISS DRANGINIS: Your Honor, I think that Mr. Albrecht is utilizing an argument probably for inappropriate purposes. I don't think that there is anything germane or relevant insofar as his testimony is concerned as to whether or not he is a collector of anything.

MR. ALBRECHT: Your Honor, this man, came here and says he is testifying as a doctor and I think the Jury is entitled to know the background as he inclinations of Dr. Luntz and if I am not permitted to do that in cross examination I think the Jury may get a distorted picture.

THE COURT: I'll sustain the objection to that particular question.

MR. ALBRECHT: May I have an exception to your Honor's both rulings.

THE COURT: Exception may be noted to both rulings. (T. 45-46, July 20, 1979).

Q Okay. Rare occasions. Doctor, let me ask you this, you did come to Court in March of 1979 wearing a tie pin made of handcuffs, did you not?

MISS DRANGINIS: Objection.

MR. ALBRECHT: It goes to his interest, your Honor.

THE COURT: I'll sustain the objection to that question.

BY MR. ALBRECHT:

Q Doctor, did you ever receive a gift from a police department of a tie pin made of handcuffs?

MISS DRANGINIS: Objection.

MR. ALBRECHT: That is a different area, your Honor.

THE COURT: I'll overrule the objection.

A Yes.

Q And did you wear that gift pin of handcuffs when you came to Court?

MISS DRANGINIS: Objection.

THE COURT: I'll sustain the objection to the last question.

BY MR. ALBRECHT:

Q Doctor, are you a collector of handguns?

MISS DRANGINIS: Objection, it is not relevant, your Honor.

THE COURT: Sustain the objection.

MR. ALBRECHT: May I have an exception, your Honor, to both of your Honor's rulings in regard to that.

THE COURT: Exception may be noted. (T. 50-51, July 20, 1979).

Q And likewise it's impossible, it is possible that the bite was imposed after death, is that not true?

A Yes.

Q In fact, Doctor, it's possible that at the time the bite was imposed the decedent was alive and moving, is that not correct, when I say moving we have already assumed that he was alive but that he could move around, I mean he was able to move?

A Yes.

Q Obviously if it was imposed after death you would have a different

situation, then the deceased would be immobile, theoretically, is that correct?

A Yes.

Q So that in this particular instance, in the particular instance because it was not determined that the bite had occurred subsequent to the demise of the deceased there could have been significant movement by the deceased between the time the bite was made and the time the decedent died and the time when the photograph was taken as well as considering that rigor mortis had to be broken before the shirts were removed, is that not correct, Doctor?

A That is correct.

Q Now, you have testified, Doctor, in another case a few years ago

where you gave an opinion, did you not, regarding a young girl out in Illinois who met her untimely demise a few years ago, is that not correct?

A That is correct.

Q And in that case is it not true that the young girl -- is it not true that it was determined by expert testimony that the bite mark occurred subsequent to the heart stopping beating, is that not true, Doctor?

A That is correct.

Q And, likewise do you not recall, Doctor, that in that particular case rigor mortis had set in and it was claimed that the body was in the same position it was at the time the bite was made when the photograph, photography was done, is that not correct?

A That is correct.

Q Likewise in that particular case silicone impressions were made, it that not correct, Doctor?

A That is correct.

Q And likewise in that case the defendant, the alleged defendant had a chip on No. 9, right here, right Doc?

A That is correct.

Q And in that case wasn't it your opinion that the most significant point for identification was the fact that there was a mark left by the chipped tooth, is that not correct, Doctor?

A You said most significant.

Q I'll say a significant.

A A significant.

Q All right. I don't want to argue semantics with you, Doctor, is that not true, Doctor.

A That is true.

Q And, is it not true, Doctor, that an other man confessed to that crime?

MISS DRANGINIS: Objection, your Honor.

THE COURT: Sustained. The Jury may disregard the question and answer may be stricken.

MR. ALBRECHT: May I have an exception to your Honor's ruling.

THE COURT: Exception may be noted. (T. 120-22, July 20, 1979).

APPENDIX E

EXCERPTS OF INQUIRY OF DR. SOPHER AND TRIAL COURT"S RULINGS ON OBJECTIONS

Q Now, Doctor, you have testified -- you have testified in other jurisdictions, have you not?

A Yes, sir.

Q The first case you testified in, if I'm not mistaken, was a case in 14 Maryland, in the State of Maryland, bite mark analysis case?

A I think that might be correct....

Q Was Dr. Luntz involved in that case with you?

MISS DRANGINIS: Objection, it's not relevant.

MR. ALBRECHT: It is relevant, Your Honor. I claim it.

MISS DRANGINIS: Who testified, when, what case, with whom, and who was on whose team is not relevant before this court at this time, Your Honor.

MR. ALBRECHT: Your Honor, I claim there is a pattern, and I intend to prove it.

MISS DRANGINIS: Your Honor, I really don't know what to do about a statement like that that is made in front of this jury, except to move to strike it and ask Your Honor to indicate to the jury to disregard it. Perhaps Mr. Albrecht has proven his point.

MR. ALBRECHT: I would like to have the opportunity to prove my point, Miss Dranginis.

MISS DRANGINIS: It is not relevant.

THE COURT: I will sustain the objection. The question may be stricken.

MR. ALBRECHT: May I have an exception to Your Honor's ruling?

THE COURT: Exception noted.

BY MR ALBRECHT CONTINUING:

Q Did you testify in a case, Milone case, in Illinois?

A That is correct, yes.

Q Dr. Luntz testified with you on that case?

MR. ALBRECHT: Objection, Your Honor, same grounds and, Your Honor, at this point --

THE COURT: What is the relevancy?

MR. ALBRECHT: Your Honor, I claim --

MISS DRANGINIS: I ask that the jury be excused from the courtroom so he can make an offer of proof on the record. He already made certain statements that are improper.

THE COURT: All right. The jury will please retire.

THE COURT: Well, I still don't understand how the question is relevant?

MR. ALBRECHT: You Honor, this witness has been working hand and glove with Dr. Lester Luntz for about eight years now. It is the typical situation, Dr. Luntz and Dr. Sopher, first Dr. Luntz testifies and Dr. Sopher testifies for the prosecution or vice versa, with one exception, and that is in the

Vermont case where Dr. Luntz and Dr. Sopher testified for the defense, and then Dr. Sopher came up with an opinion that was consistent with Dr. Luntz's.

Now, I want this jury to know the history of these two experts testifying together in the past -- practically in every major case this doctor has testified in, he has been involved with Dr. Luntz from Fort Mead to Vermont, and it is like I am dealing with a vaudeville team.

MR. ALBRECHT: I would like the opportunity to present this evidence, by offer of proof. I want to show there is a relationship between these two men and how that relationship may affect their judgment. I have an absolute right under law to go into interest, motive

and credibility on the question of cross examination, and I claim it.

MISS DRANGINIS: Your Honor, it's so remote, and it is not in any way, shape or form connectable and is prejudicial and thoroughly irrelevant.

THE COURT: I don't see where this type of questioning would be relevant.

MR. ALBRECHT: It goes to his credibility, Your Honor. I have to have the latitude. This is a murder case. I have to have the latitude of cross examination of this witness and if Your Honor forecloses my questioning of his relationship with the other witness who testified for the State, you are foreclosing an area of cross examination of motive and subjectivity and integrity

as far as his testimony is concerned. I have that right, I suggest to Your Honor, and I say if you foreclose that, you foreclose a very important part of cross examination.

THE COURT: I'll sustain the objection to this line of questioning.

MR. ALBRECHT: May I have an exception?

THE COURT: An exception may be noted.

THE COURT: Let the record note that the jury has returned to the courtroom.

CROSS EXAMINATION

BY MR. ALBRECHT CONTINUING:

Q How long have you known Dr. Luntz?

MISS DRANGINIS: Objection, it's not relevant, Your Honor. It's the same question, and Your Honor sustained the objection, outside the presence of the jury.

MR. ALBRECHT: It's not the same question. It's an absolutely different question.

THE COURT: That is a different question. What is the purpose of this offer?

MR. ALBRECHT: I intent to use that preliminarily as to his relationship with Dr. Luntz. That's the purpose of the inquiry.

MISS DRANGINIS: It is not relevant, Your Honor. Your Honor has ruled.

THE COURT: I will sustain the objection.

MR. ALBRECHT: May I have an exception?

THE COURT: Exception may be noted.

CROSS EXAMINATION

BY MR. ALBRECHT CONTINUING:

Q How many cases have you testified in where you and Dr. Luntz appeared in the same cases, Doctor?

MISS DRANGINIS: Objection, Your Honor.

THE COURT: Sustain the objection.

MR. ALBRECHT: May I have an exception?

THE COURT: Exception may be noted.

BY MR. ALBRECHT CONTINUING:

Q Has Dr. Luntz ever referred you work, Doctor?

MISS DRANGINIS: Objection, Your Honor. It's not relevant.

THE COURT: Sustained.

MR. ALBRECHT: Your Honor, I claim that specifically. If there is a monetary relationship between these two doctors, I think the jury is entitled to know it.

MR. ALBRECHT: May I have an exception to Your Honor's ruling in all of the entire area of my inquiry into the relationship between this Dr. Sopher and Dr. Luntz?

THE COURT: Yes.

Q Doctor, did you see Dr. Luntz during the lunch recess?

MISS DRANGINIS: Objection, Your Honor, this borders on definance of your order.

MR. ALBRECHT: If it is, Your Honor, I don't intend to do that.

MISS DRANGINIS: It certainly does.

MR. ALBRECHT: Miss Dranginis, please, now, please, now, Miss Dranginis, I will not further this inquiry if Your Honor directs me not to.

THE COURT: I so do that. (T. 131-141, August 1, 1979).

APPENDIX F

TRIAL COURT'S INSTRUCTION

CONCERNING PRESUMPTION OF INTENT

"The third element which the State must prove is that the person causing the death of the person must have done so with the intent to cause the death. In other words, the State must prove beyond a reasonable doubt that the accused intended to cause the death of Michael Aranow.

Now, intent is a mental process. The person's intention may be inferred from his conduct. Every person is presumed to intend the natural and necessary consequences of his or her acts. It is often impossible and never necessary to prove criminal intent by direct evidence.

Ordinarily, intent can be proved only by circumstantial evidence, as I have explained that term to you. What a person's purpose or intention has been is necessarily very largely a matter of inference. A person may take the stand and testify directly as to what his or

her purpose or intention was, and that testimony you can believe or not according to whether or not it warrants belief, but no witness can be expected to come here and testify that he looked into another person's mind and saw therein a certain purpose or intention. The only way in which a Jury can determine what a person's purpose or intention was at a given time, aside from that person's own testimony, is by determining what that person's conduct was and what the circumstances were surrounding his conduct, and from those infer what his or her purpose or intention was. To draw such an inference is not only a privilege, but it is also the duty of the jury provided, of course, the inference drawn is a reasonable one. In this case, therefore, it will be part of your duty to draw all reasonable inferences from the conduct of the accused in the light of the surrounding circumstances as to what purpose or intention was in his mind at various times. (T. 38-40, August 7, 1979). Record, pp. 34-36.

APPENDIX G

TRIAL COURT'S DECISION ON MOTION FOR NEW TRIAL

The defendant was indicted for murder in violation of Connecticut General Statutes §53a-54a (1979) on October 31, 1978. On August 13, 1979, a jury of twelve returned a verdict of guilty of manslaughter in the first degree. See Connecticut General Statutes §53a-55 (1979).

Pursuant to Practice Book §901 (1978), the defendant moved for a new trial based on alleged jury misconduct. The court denied the motion and the defendant appealed. The Supreme Court dismissed the appeal as interlocutory.

See State v. Asherman, 41 Conn. L.J. No. 38, p. 1 (Mar. 18, 1980). With the permission of the court the defendant has filed a revised motion for a new trial, challenging the court's instructions on intent and on manslaughter as a lesser included offense of murder.

I.

The court's charge on the intent element in murder and manslaughter is attached in Appendix A. The defendant claims that the portion stating that "[e]very person is presumed to intend the natural and necessary consequences of his or her acts" violates due process under Sandstrom v. Montana, 442 U.S.

510, 99 S. Ct. 2450, 61 L.Ed 2d 39 (1979) and State v. Harrison, 41 Conn. L.J. No. 9, p. 3 (Aug. 28, 1979) by impermissibly establishing either a conclusive or burden-shifting presumption of the element of intent. The court disagrees.

Language in State v. Arroyo, 41 Conn. L.J. No. 39, p. 6 (Mar. 25, 1980) is dispositive of this issue. In Arroyo our Supreme Court held that an instruction by the court on the crime of murder nearly identical to the instant one "could not be reasonably construed to require a conclusive presumption or a shifting of the burden of proof and did not deprive the defendant of his due process right to a fair trial." Id. at 8. The basis of the holding was that

the language upon which the defendant relies, although forbidden in isolation by Sandstrom 442 U.S. at 513, 99 S.Ct. at 2453, 61 L. Ed. 2d at 44, was overcome by the qualifying language indicating that the jury could infer, but need not necessarily presume, the element of intent. 41 Conn. L.J. No. 39, at 8. The court's instruction on the murder and §53a-55(a)(1) manslaughter charges in question contained the same qualifying language.[1]

The Arroyo court reversed the defendant's manslaughter conviction because, unlike the murder instructions in that case, the charge to the jury on manslaughter did not contain or refer to the passages explaining that intent is a matter of inference. Id. at 8-9. In

this Case the §53-55(a)(2) manslaughter charge referred to the court's previous explanation of the intent element. Thus because of the court's reference to its previous instruction and because of the content of the material referred to, this court has complied completely with Arroyo. Accordingly the court finds no error in its instructions on intent.

---

[1]The instructions given do differ from the Arroyo charge in their deletion or inclusion of certain adjectives, such as a "reasonable" inference as opposed to a "reasonable [inference] and a logical one," in the use of the neutral gender ("person") as opposed to the male gender ("man"), and in the use of parentheticals such as "now." These differences are ones of form, not substance, and do not serve to distinguish the legal effect of the charge in question from the murder instruction in Arroyo.

II.

The defendant next makes three challenges to the manslaughter instruction. The first stems from the fact that State v. Whistnant, 41 Conn. L.J. No. 33, at 5, 8 (Feb. 12, 1980) now requires that to justify the giving of a lesser included offense instruction the evidence differentiating the greater and lesser offense must be in dispute. The argument is that since the court twice commented that it saw no evidence of extreme emotional disturbance, see Appendix B, its instruction permitting the jury to find the defendant guilty of manslaughter because of this mental state, see Conn. Gen. Stat.

§53a-55(a)(2) (1979), instead of murder, see id. §53-54a (1979), was unwarranted.

Defendant's reliance on Whistnant is misplaced. First, it is not clear that Whistnant, which was decided subsequent to the charge to the jury in the instant case, should apply retroactively. When a new constitutional rule, such as the one pronounced in Whistnant, does not relate to the accuracy of guilty verdicts, the test for retroactivity considers the nature of reliance by the state on the old rule and the impact of the new rule on the administration of justice. Handerson v. North Carolina, 432 U.S. 233, 243, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1976). Here reliance on the old rule would seem totally justified. As

late as three months after the trial our Supreme Court had defined lesser included offenses without reference to the evidence component upon which defendant relies. See State v. Amaral, 41 Conn. L.J. No. 21, at 9, 10 (Nov. 20, 1979). Although the burden on the administration of justice of applying Whistnant retroactivity is difficult to assess, even if that burden were light this factor could be seen as less significant than the good faith reliance on the old rule.

Even assuming that Whistnant operates retroactively, it does not necessarily apply to the particular offenses in question. Whistnant does not eliminate the rule, stemming from State v. Brown, 163 Conn. 52, 61, 30-1 A.2d

547 (1972), that for offenses to be considered included one must necessarily commit the lesser in the act of committing the greater. 41 Conn. L.J. No. 33, at 5, 8 & n.12. Since one need not act under extreme emotional disturbance to commit murder - in fact, under General Statutes §53a-54a(a), such a mental state precludes a murder conviction -- it follows, as the defendant admitted at oral argument, that extreme emotional disturbance manslaughter, see Conn. Gen. Stat. §53a-55(a)(2) (1979), is not a lesser included offense of murder. Thus the Whistnant requirement that the evidence distinguishing included offenses be in dispute before charging

on the lesser offense has no relevance here.[2]

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[2]Insofar as defendant takes issue with the court's comments on the evidence, as opposed to the giving of the affirmative defense instruction in light of those comments, that claim has no merit. It is well settled that a trial court may, at its discretion, call the attention of the jury to the evidence or lack thereof so long as it does not direct or advise the jury how to decide a particular matter. State v. Mullings, 166 Conn. 268, 274, 348 A.2d 645 (1974). Here the court specifically informed the jury with respect to whether evidence of extreme emotional disturbance existed that "it is your recollection that counts, not mine." See Appendix B.

Defendant's second challenge to the manslaughter instruction focuses on the court's use of the example of a husband's killing of an adulterer in bed with his wife to illustrate the offense of extreme emotional disturbance - manslaughter. It is true that the new murder defense of extreme emotional disturbance, see Conn. Gen. Stat. §53a-54a(a) (1979), and the traditional "heat of passion" defense are not interchangeable. State v. Elliot, 177 Conn. 1, 4, 411 A. 2d 3 (1979). However, the court finds nothing in the leading discussions of the new murder defense, see id; People v. Shelton, 88 Misc. 2d 136, 385 N.Y.S. 2d 708 (1976), that inextricably links the illustration given with the heat of passion defense.

If anything, the Elliot court's statement that "[a] homicide influenced by an extreme emotional disturbance, in contrast, is not one which is necessarily committed in the 'hot blood' stage," 177 Conn. at 7, 411 A.2d 3 (emphasis added), allows for the possibility that the hypothetical husband's killing would have given rise to an extreme emotional disturbance defense. Further support for this view comes from Elliot's definition of killing under an extreme emotional disturbance as one in which "reason was overborne by extreme intense feelings, such as passion, anger, distress, grief, excessive agitation or other similar emotions." Id. at 9, 411 A.2d 3.

The court also relies on the proposition that the test to be applied to any part of a charge is whether the charge considered as a whole presents the case to the jury so that no injustice will result. State v. Spates, 176 Conn. 227, 235, 405 A.2d 656 (1978). Since the court defined the extreme emotional disturbance defense as specified in Elliot, 177 Conn. at 9-10, 411 A.2d 3; Appendix B, it finds no injustice in the affirmative defense instruction.

Defendant's final argument is that the court erred in instructing the jury that it could convict on intent to cause serious physical injury - manslaughter, see Conn. Gen. Stat. §53a-55(a)(1) (1979), as a lesser included offense of

murder. Relying on Whistnant, defendant claims that the evidence of the elements distinguishing the two offenses was not "sufficiently in dispute to permit the jury consistently to find the defendant innocent of the greater offense but guilty of the lesser." 41 Conn. L.J. no. 33, at 8.

The court has already indicated its reluctance to apply Whistnant retroactively. In any event, the defendant would gain nothing from its application. The element differentiating murder and §53a-55(a)(1) manslaughter is intent. Murder requires the intent to cause death, while §53a-55(a)(1) manslaughter requires only intent to cause serious physical injury. See State v. Arroyo, 41 Conn. L.J. No.

39, pp. 6, 7 n.2 (Mar. 25, 1980); Conn. Gen. Stats. §§53a-54a(a), 55(a)(1) (1979). Intent is a question for the jury and is usually inferred from conduct. State v. Holley, 174 Conn. 22, 26, 381 A.2d 537 (1977). Thus it is appropriate to draw on authority justifying the giving of a lesser included offense instruction when the evidence on the distinguishing elements, although not explicitly in dispute, permits contrary inferences by the jury. United States v. Comer, 421 F. 2d 1149, 1154 (D.C.Cir. 1970). Our Supreme Court has just today announced agreement with these principles. State v. Rodriguez, 41 Conn. L.J. No. 44, pp. 12, 20 (Apr. 29, 1980).

There was ample evidence at this defendant's trial permitting contrary inferences as to, if not explicitly controverting, the level of intent involved in the killing. The court, in fact, instructed the jury that this matter "is for you to determine from all the facts." See Appendix C. Accordingly, the court finds no error in the instructions on the charge of manslaughter in the first degree.

For the foregoing reasons, the defendant's motion for a new trial is denied.

MISSAL, J.

Filed April 29, 1980.

APPENDIX H

TRIAL COURT'S INSTRUCTION

CONCERNING MANSLAUGHTER

"If the State has failed to prove any one of the three elements of the crime of murder, then your conclusion must be that the State has failed to make out a case of murder, and you should then turn your attention to the consideration of the question as to whether or not the accused is guilty of some lesser offense, lesser degree of homicide.

Our statutes state that manslaughter in the first degree consists of causing the death of another person in two different classifications. The first classification is causing the death of such person with intent to cause serious physical injury, and the second classification is intentionally causing such death under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance. In other words, the second classification of manslaughter in the first degree is

distinguished from murder because the intentional causing of the death was under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance." (T. p. 40-41, August 7, 1979).

"The second element the State must prove in connection with the second classification of the lesser charge of manslaughter in the first degree is that the person causing the death of the person must have done so with intent to cause the death. In other words, the State must prove beyond a reasonable doubt that Steven Asherman attacked Michael Aranow with the intent to cause his death but under circumstances showing extreme emotional disturbance. The classic example of such cases are when the husband returns home to find his wife making love to a stranger and then kills one or both of them. I recall nothing in the events of this nature but remember, it is your recollection that counts, not mine." (T. p. 47, August 7, 1979), See, Record pp. 36-38.

and further charged as follows:

"Therefore, in order for this accused to be found guilty of the crime of manslaughter in the first degree under this second

classification that we have been discussing, you must find beyond a reasonable doubt that he intended to cause the death of Michael Aranow, that he did cause the death of Michael Aranow, but under circumstances which do not constitute murder, as I have defined it, because he was acting under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, and, as I stated before, I recall no such disturbance." (T. p. 48, August 7, 1979).

APPENDIX I

TRIAL COURT'S DECISION ON MOTION FOR NEW TRIAL AND IN ARREST OF JUDGMENT

Defendant moved to set aside and arrest the verdict of guilty of manslaughter in the first degree because of alleged improper conduct of the trial jury during the deliberative process. The motion also pursues such matters as improper instructions to the jury, and admissibility of certain evidence, but these were not briefed or argued. As far as this motion is concerned, they are considered abandoned.

A public hearing was held on the motion in which jurors were examined and

cross-examined by counsel for the parties hereto.

Jurors Warden Henry, Allan Turner, Thomas McGahan, Henry Streib and William Casey testified.

Defendant claims the following matters constituted jury misconduct sufficient to warrant a new trial in that the listed activities deprived him of his right to a fair trial:

1. A belt and shirt, not exhibits admitted at the trial, were brought into the jury room and a body-dragging experiment was conducted with these items.

2. Eleven jurors deliberated while juror Streib was ill and not present.

3. A telephone conversation between jurors Henry and Turner prior to coming to court during the period of time in which the jury was considering its verdict was improper.

4. Juror Streib read a dictionary definition of the word "inference" to the other jurors which was prejudicial.

5. An experiment consisting of stabbing a tree over one hundred times to determine what effect, if any, there would be on the hand of the wielder of the knife was allegedly carried out by juror Henry.

It is the contention of defendant that these activities of the jurors deprived him of his fundamental constitutional rights and a fair trial.

With respect to the burden of proof in a hearing on alleged jury misconduct such as this, where there is a claim of intrusion into the constitutional rights of an accused, the accused has the burden of establishing the acts of jury misconduct. Once the defendant establishes misconduct, the burden shifts to the State. Aillion v. State, 168 Conn. 541. The verdict of the jury must be set aside and a new trial ordered unless the State establishes beyond a reasonable doubt that the misconduct was harmless. A finding that misconduct occurred creates a presumption of prejudice that must be overcome by affirmative evidence produced by the State. The Court, applying an objective test, shall assess

for itself whether or not there is a likelihood that the misconduct would affect a jury's verdict. Aillon v. State, supra, Before constitutional error can be held not to affect a jury's verdict, the Court must be able to conclude that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24.

The duties of jurors are defined in Section 51-245 of the General Statutes of Connecticut, and require that the jurors shall not "converse with any person, not a member of the jury, relative to the cause under consideration, before they have returned their verdict; and when they have agreed upon a verdict they shall return it to the court...."

Historically, a juror could not provide any testimony to the court to defeat his verdict. Vaise v. Deleval, 1 T.R. 11 (K.B. 1785). Over the years this rule has been eroded.

The present Connecticut rule has been articulated in the Aillon case, supra, where the court allowed testimony from a juror as to the fact of "extraneous influence", but refused to hear any testimony involving the effect of that influence on the deliberative process. The first step in deciding whether a new trial should be granted because of jury misconduct is whether any of the claims of defendant come within the definition of "extraneous influence". Secondly, if so, whether

the "extraneous influence" had a prejudicial effect on the jury.

One group of Connecticut cases prior to Aillon v. State, supra, mostly concerned statements made by jurors to third persons or by third parties to jurors wherein the State Supreme Court upheld the trial court's denial of a motion for mistrial. Bluett v. Eli Skating Clug, 133 Conn. 99; Burns v. The State, 84 Conn. 518, Genuario, et al v. Fuikler, et al. 136 conn. 500; State v. Williamson, 134 Conn. 203; State v. Savage, 161 Conn. 445; State v. Siberon, 166 Conn. 455.

Several Connecticut cases have addressed the issue of certain documents being sent into the jury room in error, during the deliberative process. Gimelli

v. Waterbury Cadillac Co., Inc., 109 Conn. 722; Yavis v. Sullivan, 137 Conn. 253.

Thus is can be concluded that the Connecticut Statutes and case law have recognized the inherent danger in a juror communicating with a person other than other jurors and, in civil cases, of improper documents being sent into the jury deliberating room along with the pleadings, exhibits and verdict forms. There are no Connecticut Statutes or cases on the claimed misconduct of this jury so that it is necessary to study the various claims of a defendant through decision in other jurisdictions.

I.

Experimentation by Jurors in Deliberation Room.

Defendant claims that a juror surreptitiously brought into the jury room a belt and shirt, not introduced into evidence as exhibits and utilized them in an experiment in which one juror tried to lift another juror lying prone on the floor and carry him five to six feet.

Connecticut Statutes, case law and the Practice Book are silent on jury experimentation. Nowhere is it a prohibited or an accepted practice.

In other jurisdictions, the courts in the following cases refused to grant new trials because of experimentation by the jury.

In U.S. v. Hephner, 410 F. 2d 930, a juror covered his head and put on sunglasses in accordance with testimony in order to determine whether identification was possible with that disguise. The court states at page 936 that "jurors must be given enough latitude in their deliberations to permit them to us their common experience and illustrations in reaching their verdict."

In both U.S. v Callahan, 442 F. Supp. 1213 and McLane v. State, 379 S.W. 2d 339 (Tex.), a woman's stocking was used by jurors to determine if a person wearing the stocking as a mask could be identified.

Experiments by jurors with articles imported into the jury deliberation room

were sanctioned in the following cases: U.S. v. Welch, 377 F. Supp. 363 (adhesive tape used); Douthit v. State, 482 S.W. 2d 155 (Tex) (electrical cord used); State v. Houston, 209 N.W. 2d 42 (Iowa) (turning of lights to test visibility at night, through glass windows); State v. James, 424 P.2d 1005 (Wash); Thompson v. State, 518 P.2d _____ (Okla).

In State v. Smith, 196 Iowa 1003, 193 N.W. 418, a juror brought in a magnifying glass to examine the exhibits for the purpose of identifying writing on disputed exhibits, during deliberation. Jurors produced such items of their own property, not admitted into evidence such as checks

and letters to buttress their respective viewpoints.

The court stated at 422-423:

> "It cannot be fairly said that this violates the rule to which we have referred against the introduction into the jury room of additional or other evidence not produced at trial. A juror is not forbidden to consider and pass upon the evidence in light of common experience and common observation. Discussion and deliberation in the jury room would be idle form if jurors were bound to refrain from illustrating or emphasizing their views by reference to any matter or thing which they have found to be true or false in their individual experience, and if verdicts were to be held violated thereby, the jury system would better be abandoned altogether."

Thus, in any other jurisdictions, the use of experiments by jurors have been approved including experiments with items that have not been accepted as exhibits. Here, the jury conducted the experiment to test the State's claim

that a single person such as the defendant could have lifted the victim and carried him several feet. The experiment was suggested by the activities of defendant's counsel and his investigator in reenacting part of the same experiment in the courtroom before the jury.

The items which were brought into the jury deliberation room, a shirt and a belt, were common everyday items which practically every male wears. The experiment was conducted in a manner that has reasonably been consistent with the testimony presented to the jury. The experiment merely tested the credibility of the testimony.

The Court, therefore, finds that the State has provided beyond a

reasonable doubt that any misconduct of the jury in this regard was harmless and without prejudice to the defendant.

II.

Defendant claims that eleven jurors deliberated in the absence of the twelfth juror who was not present because of illness.

Prior to the opening of court on Tuesday, August 8, 1979, a message was received from a doctor that juror Streib had chest pains and had been advised to remain at home because of his long history of heart problems. At the suggestion of the Court, juror Streib went to the New Milford Hospital; was examined and pronounced able to resume his duties as a juror. He returned to the deliberations at 2:10 p.m..

Defendant contends that during his absence the eleven remaining jurors continued their deliberations of the case.

The Clerk's log of the activities in the courtroom on August 8, 1979, that court opened at 10:20 a.m. with eleven jurors present and the jurors were excused until noon, with an admonition by the court not to deliberate until the entire jury was together. Court was then reconvened at 12:09 P.M. with 11 jurors present and was recessed at 12:10 p.m. for lunch until 2:00 p.m.. Juror Streib joined the eleven other jurors at 2:10 p.m. and the jury started deliberating.

Prior to the time that juror Streib returned, the State proved beyond a

reasonable doubt that there was no jury deliberations in the instant trial. During the short period of time the eleven jurors were together, discussion was limited to the health of juror Streib.

III.

Defendant claims that a telephone conversation between Juror Henry and Juror Turner prior to coming to court during the period of time in which the jury was considering its verdict was improper and prejudicial to the defendant.

Juror Henry and juror Turner each testified that the conversation lasted less than two minutes and that their discussion was relative to bringing the

shirt and belt for the experiment discussed above.

This telephone call cannot be construed to be deliberation because there was no discussion of the guilt or innocence of the defendant. The alleged misconduct is not an extraneous influence but rather an intra-jury communication. The State has proved beyond a reasonable doubt that this conduct was harmless and not prejudicial to the defendant.

IV.

Defendant claims that Juror Streib read a definition of the word "inference" to the other jurors which was prejudicial.

during the deliberations, Juror Streib read a definition of the word

"inference" which he had copied from a Funk and Wagnall Dictionary. The definition as read to the jury is as follows:

> "Item 1, that which is inferred; a deduction or conclusion. Two, the act or process of inferring. Three, loosely, a conjecture... Four, is the comprehensive term for the formal drawing of conclusions; it includes both induction and deduction. Deduction is the inferring of a universal or general rule from particular instances. Deduction is the reverse process of drawing a conclusion as to a particular instance from general premises."

The definition most objected to is "loosely, a conjecture".

The Court's charge to the jury was lengthy and complete on the word "inference" and the jury asked that the part of the charge involving circumstantial evidence and inference be repeated.

In United States v. Sanchez, 380 F. Supp. 1260, a juror defined the word "conspiracy" by relation an incident in which he was convicted of the crime of conspiracy.

The court at page 1271, citing other authorities states:

"Most of the acts complained of took place in the jury room and related largely to discussions between the jurors." The Court concluded that this was not grounds for a new trial.

Juror Streib's reading of the definition of the word "inference" imparted to the jury only the common meaning of the word.

The jury was instructed that they must accept the charge of the court as to the law of the case, whether they

agreed with the charge or not. These instructions are sufficiently strong to override any common dictionary definition which was discussed by the jury during their deliberations.

The State has proved to the court beyond a reasonable doubt that the definition of "inference" as represented by juror Streib was not sufficiently prejudicial to defendant to warrant a finding that defendant's Sixth Amendment rights were infringed and was harmless.

V.

Defendant claims that an alleged experiment by juror Henry consisting of stabbing a tree over one hundred times to determine what

effect, if any, there would be on the wielder of the knife.

A pathologist had testified on behalf of defendant that a person who stabbed a body over one hundred times would injure his hands. ANother pathologist who testified on behalf of the State stated that there would not necessarily be any damage to the hand.

From the evidence elicited at this hearing, juror Henry denied making the experiment but said, "There might have been some misleading statements that I made to the jury that indicated that I might have either had the desire to try that or had in fact done so."

The Court finds that the State has proved beyond a reasonable doubt that such experiment was not conducted by

juror Henry and that any discussion about said experiment was strictly intra-jury remarks made during a lengthy deliberation which did not prejudice the defendant nor infringe upon his constitutional rights.

Conclusion

The stability of jury verdicts, and the finality of legal proceedings are an important concern for our system of justice. The Court must concern itself with the integrity of the jury system, and the right of privacy and secrecy allowed to the jurors. In order to maintain our Constitutional Rights to a trial by jury, we must have competent jurors. It is essential that the

integrity of each person who serves the State of Connecticut as a juror, be assured that his actions will not be scrutinized outside the limits of the law.

It is clear from Connecticut Statutes and cases that jurors should not converse with any person not a member of the jury, regarding the case being considered, Tomlinson v. Derby, 41 Conn. 268, 274, and that no one other than the jurors should be present to speak to the jurors when assembled for deliberation. Cook v. Miller, 103 Conn. 267, 273.

The jury must decide the case free from external influences, which interferes with its unbiased judgment.

In the instant case, any activities of the jury which might be considered improper were harmless. Defendant failed to prove that the other allegations of jury misconduct were improper.

Therefore, defendant's motion for a new trial and motion to set aside the verdict and arrest judgment is overruled.

MISSAL, J.

Filed November 23, 1979.

APPENDIX J

JUDGMENT OF
CONNECTICUT SUPERIOR COURT

STATE OF CONNECTICUT

NO. 18-28922	SUPERIOR COURT
STATE OF CONNECTICUT	JUDICIAL DISTRICT
VS.	OF LITCHFIELD
STEVEN M. ASHERMAN	APRIL 29, 1980

Present, Hon. Harold M. Missal, Judge

JUDGMENT

Upon indictment laid before the Grand Jurors of the County of Litchfield, duly summoned, impaneled and sworn, on October 31, 1978, charging said Steven M. Asherman with the crime of Murder in the words and figures following:

No. 18-28922

IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, JUDICIAL DISTRICT OF LITCHFIELD, SEPTEMBER TERM, 1978.

The Grand Jury of the County of Litchfield by this indictment accuses STEVEN M. ASHERMAN of New York City, New York, of the crime of Murder and charges that at the Town of New Hartford, July 29, 1978, the said STEVEN M. ASHERMAN, with intent to cause the death of another person, MICHAEL ARANOW, did cause the death of such other person, in violation of Subsection A of Section 53a-54a, General Statutes of Connecticut.

ATTEST:

/s/ Paul R. Phalen

Foreman

Dated at Litchfield, Connecticut this 29th day of July A.D. 1978 as by indictment on file will appear.

The said defendant appeared, and being of the age of twenty-nine years, then for plea said "Not Guilty" to said indictment on October 31, 1978, and elected to be tried by a Jury of Twelve.

Thence said cause came to this Court on the thirteenth day of August, 1979 when the defendant having again appeared and after a full hearing, the case was committed to the jury; who, at 12:28 P.M. returned a verdict of guilty of a lesser included charge of Manslaughter in the First Degree, which verdict was accepted and ordered recorded by the Court.

Thence to November 23, 1979 when the parties having appeared and argued motions for a New Trial and in Arrest of Judgment, the Court overruled said motions.

Thence to April 28, 1980 when the parties having appeared and argued revised motion for a New Trial, the Court denied said motion.

A written report of investigation as to the defendant by the Probation Department was presented to and considered by the Court before sentence.

Whereupon it is adjudged that the said defendant Steven M. Asherman be placed in the custody of the Commissioner of Corrections for the term of not less than seven years nor more than fourteen years.

BY THE COURT

David C. Bristol

Date of Judgment, April 29, 1980

STATE OF CONNECTICUT *v.* STEVEN M. ASHERMAN (10160)

PETERS, PARSKEY, GRILLO, HENNESSY and SPADA, Js.

Indicted for the crime of murder and convicted of the lesser included offense of manslaughter in the first degree, the defendant appealed. From the evidence presented at trial the jury could reasonably have found that, on the night in question, the defendant and the victim had hiked to the top of a mountain where the defendant stabbed the victim with a knife over 100 times. There was also evidence presented by L, a physician, to the effect that a bite mark which appeared on the victim's back had been inflicted by the defendant. *Held:*

1. Because, under all of the circumstances, the police had probable cause to believe that the defendant had killed the victim when, on the day following the killing, they interviewed him at the crime scene, the trial court did not err in refusing to suppress from evidence certain items which they had seized from him on that day.
2. The defendant was not deprived of his right under the state constitution (article first, § 8) not to give evidence against himself when he was compelled by court order to allow for identification purposes the taking of wax impressions and photographs of his teeth; those impressions and photographs constituted nontestimonial evidence.
3. The taking of a dental impression of the defendant's teeth did not constitute an impermissibly suggestive identification procedure which was violative of his right to due process.
4. There was an adequate factual basis for the expert testimony of L to the effect that, in his opinion, the bite mark on the victim's back had been inflicted by the defendant.
5. The trial court did not unduly restrict the scope of the defendant's cross-examination of the state's expert medical witnesses.
6. The trial court did not err in admitting into evidence a hair sample which had been found on the defendant's key ring and which, upon examination, matched the characteristics of the victim's hair; the fact that the hair sample had been broken did not, as the defendant claimed, consti-

tute a material alteration of evidence.

7. The trial court did not err in denying the defendant's motion to strike certain evidence relating to the blood and hair which had been found on his key ring; the fact that the entire blood sample which had been taken from the key ring was used up in the test which established that it was blood did not deprive the defendant of his right to a fair trial.
8. The trial court did not abuse its discretion in admitting into evidence certain testimony to the effect that the defendant had smoked marijuana with the victim on the night of the killing.
9. The evidence was sufficient to support the jury's conclusion that the defendant was guilty of first degree manslaughter; the jury could justifiably have concluded that when he killed the victim the defendant was under extreme emotional disturbance.
10. The trial court did not err when, during its charge to the jury on the definition of "extreme emotional disturbance," it used the example of a "heat of passion" killing.
11. The trial court's instruction to the jury that "every person is presumed to intend the natural and necessary consequences of his acts," did not, when read in the context of the entire charge, shift to the defendant the burden of proof on the issue of intent.
12. The trial court did not err in denying the defendant's motion for a mistrial made on the ground of juror misconduct; the defendant failed to sustain his burden of demonstrating that his right to a fair trial had been prejudiced as a result of the claimed misconduct.

Argued March 8—decision released July 17, 1984

Indictment charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Litchfield and tried to the jury before *Missal, J.;* verdict and judgment of guilty of manslaughter in the first degree, and appeal by the defendant to this court. *No error.*

Maxwell Heiman, with whom was *William J. Tracy, Jr.,* for the appellant (defendant).

John M. Massameno, assistant state's attorney, with whom were *Anne C. Dranginis,* assistant state's attorney, and, on the brief, *Dennis A. Santore,* state's attorney, and *Lisa Sokoloff, James P. Rock* and *James R. Turcotte,* legal interns, for the appellee (state).

PARSKEY, J. The defendant was indicted for the murder of Michael Aranow at the town of New Hartford on July 29, 1978. After a trial to the jury the defendant was convicted of the lesser included offense of manslaughter in the first degree in violation of General Statutes § 53a-55.[1] In his appeal the defendant asserts that the court erred in (1) refusing to suppress a number of items taken from him as a result of an alleged illegal seizure; (2) compelling him to submit to dental impressions and thereafter permitting the use of such impressions for identification purposes; (3) permitting evidence of alleged prior unrelated offenses; (4) restricting the defendant's cross-examination of the state's expert witness; (5) admitting in evidence a set of keys and a piece of hair taken from a key ring; (6) instructing the jury with respect to the offense of manslaughter in the first degree; and (7) refusing to set aside the guilty verdict because of alleged jury misconduct. We have examined each of these claims and find no error.

Based on the evidence presented at trial, the jury could have reasonably found the following facts: On a Saturday evening, July 29, 1978, the defendant and the victim, who were both students at the Columbia Medical School, traveled from the victim's family home in

[1] "[General Statutes] Sec. 53a-55. MANSLAUGHTER IN THE FIRST DEGREE: CLASS B FELONY. (a) A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection; or (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.

"(b) Manslaughter jn the first degree is a class B felony."

BEST AVAILABLE COPY

Hastings-on-Hudson, New York, to New Hartford, Connecticut, to take a break from work on a school computer project. They arrived in New Hartford at the country estate of the victim's family between 9:00 and 9:30 p.m. As they drove to the Kingdom Game Club, which adjoins the estate, the victim's brother, Philip, noticed the lights of their automobile from the cabin in which he and a friend, Robert Lawrence Lane (Larry Lane), were staying and decided to find out who was entering the property. They drove to the game club and met the defendant and the victim.

The four young men exchanged greetings and introductions, after which the victim told his brother that he and the defendant were going to the lookout at the top of Jones' Mountain and that they might see them later that night at Philip's cabin. Because it was a particularly "buggy" night, Philip offered to them some insect spray. The four parted, but neither the defendant nor the victim went to Philip's cabin later that night.

The defendant and the victim proceeded to walk through the woods about one mile until they reached the lookout. Because the night was so dark, the victim had to lead the defendant by the hand. When they arrived at the lookout some unexplained emotion or circumstance, induced perhaps by a mind-altering drug, led the defendant to slay the victim brutally by stabbing him with a knife over 100 times in the face, back, buttocks and left leg, and slashing his throat. Some of the wounds were inflicted post-mortem. The defendant also bit the victim on the upper left portion of his back, over the scapula.

The defendant then attempted to hide the body by moving it, but succeeded in moving it only five and one-half to six feet. He left the scene, covered with blood, looking for some place where he could wash the blood

off of his clothing. As he walked through the woods, he hid somewhere the knife that he had carried to the scene in a "day pack" and the shirt he was wearing, which was drenched in blood, and came upon a stream or nearby pond, where he attempted to wash the blood from the rest of his clothing. He also smeared silt and dirt all over the front of his jeans.

After day broke, on Sunday morning, he walked down to the home of the victim's uncle, Frank Jones. Jones was awakened at 7:30 a.m. by the defendant's shouts at the front door and the barking of Jones' dogs. Coming to the door in his pajamas, Jones found the defendant, stripped to the waist, clad in blue jeans that were soaking wet. The defendant, who was obviously tense, told Jones that he and the victim had been in the woods when they encountered "two guys with a gun." He had escaped but could not find the victim, and wanted to call the police and the victim's parents right away. Jones, who knew that his nephew was familiar with the woods, wanted to find out more before getting excited and calling the police or the Aranows.

After the defendant mentioned the victim's name, Jones let him into the house. The defendant asked for a drink of water and asked also if he could wash his hands, which he was permitted to do at the kitchen sink. Jones noted that, while the defendant wore no shirt, he had no bruises or insect bites anywhere on the exposed part of his body. He could also observe that the defendant appeared to be on drugs or to have been drinking. In response to Jones' question about the matter, the defendant said that he thought he and the victim had had a couple of beers.

The defendant went on to tell Jones that the night before, he and the victim were walking to a place on the top of the mountain, where there was a view, when they were approached by two drunken men, one of

whom had a gun. According to the defendant, the men asked the victim and him for something, after which the defendant shoved the man with the gun into the other, and he and the victim ran off into the woods.

Jones and the defendant then proceeded in Jones' automobile up Steele Road and onto Henderson Road to Philip Aranow's cabin in order to see if Michael was there. At the cabin, the defendant requested and was given a shirt to wear. He began to give additional details about what had happened the night before, saying that he had seen the flash of a knife one of the men had; that one of the men chased him through the woods for a long time; and that his shirt had been lost as he ran through the woods. The defendant kept repeating that they should call the police. He then went by car with Philip Aranow and Larry Lane to the victim's car and the Kingdom Game Club. Having parked Philip's car on the road to the lookout, they proceeded on foot towards the lookout. Jones had taken his car and gone back down Henderson Road and Steele Road to his home and then up the mountain from the opposite direction.

As the three young men approached the lookout, the defendant, who had been calling out for the victim, fell back from the other two. Jones approached from the other direction and saw the body of the victim lying face down at the lookout. He approached the body while the three young men remained on the dirt road, tried to find a vital sign, and, when he did not, told the others that Michael was dead. Frank Jones left the three young men near the lookout as he went to call the police.

Trooper Joseph Bieluch was the first officer to arrive and hear the defendant's explanation. He noted that the defendant's jeans were extremely dirty and wet, as if smeared with silt from a pond. His jogging shoes

were also wet, though his hands and arms were clean. He was wearing his glasses and had no apparent bug bites, scratches or cuts. He had a red substance in the corners of his mouth, which appeared to be blood, and Bieluch detected the foul smell of rancid blood. The trooper believed that the defendant was under the influence of something.

Later, the three young men went down to the Jones' residence to give statements to the police. The defendant was interviewed by Trooper Calkins. He stated that, after he and Michael had left Philip and Larry, they walked about one-half hour into the woods when suddenly they were confronted by two men before they reached the lookout. He said that these men "just appeared right in front of them." Yet, the only description he could give of them was their relative height. He assumed that they were males by their voices, about which there was nothing unusual. He said the shorter of the two was carrying a long gun, and the taller had something in his hand that "glinted." Their breath smelled of alcohol. He said the two men made a demand of some kind for their belongings and that he suddenly pushed the smaller of the two into the other and ran off with Michael. Almost immediately, they became separated. He said he ran in the woods for about one-half hour before he stopped to rest, when he heard what sounded like a gunshot. Neither Philip nor Larry heard any gunshots or other strange sounds during the evening. The defendant also told Trooper Calkins that, while running through the woods, he had lost his "day pack" and his shirt had been ripped off of his body by the branches and brush.

Later, the defendant was asked to reduce his statement to writing at the New Hartford Town Hall. There, Troopers Robert Terry and Richard Raposa saw spots on the defendant's blue jeans that appeared to be blood. When asked to empty his pockets, the defendant pro-

duced a key ring on which a red hair, similar to the victim's, was embedded in blood. The defendant, who was surprised to see the blood and hair, wanted to know how long it would take the lab to determine whether or not it was blood. When Sergeant Henry DesChamps later asked the defendant to describe his assailants, he merely shrugged his shoulders and gave no answer.

During the interview at Town Hall, Sergeant DesChamps asked the defendant if he had killed the victim. The defendant paused for a few moments and, looking down, said "no." Before he left the New Hartford Town Hall, he shook hands with DesChamps, thanked him for the way he had treated him, and promised to come back some day and tell him what had happened on the hill.

The investigation of the scene began upon discovery of the body and continued for a number of days thereafter. An expert in crime scene analysis testified that there was no sign of a struggle on the small path leading to the lookout or at the nearby road, but that there was a primary and secondary crime scene at the lookout, and that the body had been lifted five and one-half to six feet from the primary to the secondary scene. He also stated that there would have been no way for two men to drag or otherwise force the victim onto the lookout over the small path without creating some disturbance to the path or the vegetation surrounding it.

Expert dog track evidence was presented by Trooper Andrew Rebmann who handled the bloodhound "Clem." An American Kennel Club registered bloodhound, Clem had been cited for tracking a person who had been missing for eight days and another young girl, found alive after being missing for three days. Clem acquired the scent of the victim from his shoe and tracked him, with a good strong pull, from the Kingdom Game Club (where his car was parked) along the dirt roads leading

to the lookout. Without variation, Clem went directly to the lookout, circled at a pool of scent of the victim and stopped. The track demonstrated that the victim had never run from any assailant, but proceeded directly to the lookout.

A wide-ranging search of Jones' Mountain by the state police and over one hundred volunteers with metal detectors, failed to yield evidence of a ripped shirt, day pack, spent gun shells or any other evidence that would substantiate the defendant's story. All the ponds were searched by Connecticut state police divers without yielding evidence of the crime.

The mountain, as depicted in state's exhibits A, D, X, and Y, was a rugged area of deep, thick woods and full underbrush.

Agent Robert Spalding, of the FBI laboratory, testified that human blood was found in the knees and surrounding front area of the defendant's blue jeans and was especially apparent on the front inside portion of the jeans. The blood stain covered a surface of 12" x 8" on the front of the right leg and 9" x 5" on the front of the left leg. No further tests could be done, however, because of the dirt embedded in the fabric and the fact that the blood had been diluted by water.

Other expert testimony indicated that the hair on the key ring originated from the head of the victim and had been embedded in human blood on the defendant's key ring. Finally, Dr. Lester Luntz, a forensic odontologist, testified, after exhaustive comparative analysis that, to a "reasonable degree of dental certainty," the bite mark on the victim's back had been inflicted by the defendant's teeth.

On the basis of this evidence, the defendant was convicted of manslaughter in the first degree; General

Statutes § 53a-55; and was sentenced thereon to a prison term of not less than seven years nor more than fourteen.

I

PROBABLE CAUSE TO SEIZE ON JONES' MOUNTAIN

The defendant claims that he was illegally seized by Trooper Bieluch while the two of them were at the top of Jones' Mountain and that since Bieluch had insufficient probable cause to make a warrantless arrest at that point any statements or items of personal property taken from him incidental to such arrest were illegally seized in violation of the fourth and fourteenth amendments to the United States constitution. If, in fact, the defendant was seized in a constitutional sense at that point, in the absence of probable cause, such seizure would be unreasonable within the meaning of the fourth amendment; *Dunaway* v. *New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979); and under article first, § 7 of the Connecticut constitution; *State* v. *Ostroski*, 186 Conn. 287, 290, 440 A.2d 984, cert. denied, U.S. , 103 S. Ct. 173, 74 L. Ed. 2d 142 (1982); and the fruit of such seizure, whether consisting of oral statements; *Wong Sun* v. *United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); or personal property; *State* v. *Federici*, 179 Conn. 46, 53, 425 A.2d 916 (1979); would be subject to suppression.

It is not at all clear that the defendant was seized in a constitutional sense by Trooper Bieluch on Jones' Mountain. The trial court observed that Bieluch had a right to preserve the scene where the body was found. To the extent that this observation suggests a murder scene exception to the constitutional requirements respecting search and seizure no such exception is recognized. *Mincey* v. *Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). Nevertheless, the situa-

tion in which Bieluch found himself at the murder scene is not totally irrelevant to the question of whether the defendant was detained on Jones' Mountain.

If Trooper Bieluch had probable cause to arrest the defendant at the lookout on Jones' Mountain then any articles seized from him incidental to that arrest would not be subject to suppression on fourth amendment grounds. *State* v. *Penland*, 174 Conn. 153, 155, 384 A.2d 356, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978). Probable cause means more than mere suspicion. There must be facts and circumstances within the officer's knowledge, and of which he has trustworthy information, sufficient to justify the belief of a reasonable person that a felony has been committed and that the person subject to being arrested has committed it. *State* v. *Acklin*, 171 Conn. 105, 113, 368 A.2d 212 (1976). If probable cause to arrest exists, whether the officer intended to arrest at that point is of no consequence. *State* v. *Carter*, 189 Conn. 611, 619, 458 A.2d 369 (1983). Because our consideration of the probable cause issue is dispositive of the trial court's ruling on the motion to suppress we need not consider whether the defendant was in fact seized at the lookout and if so whether his detention could be justified on the basis of something less than probable cause, namely, an articulable suspicion. See *United States* v. *Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497, reh. denied, 448 U.S. 908, 100 S. Ct. 3051, 65 L. Ed. 2d 1138 (1980).

The facts pertinent to the seizure issue are the following: At approximately 8:25 on the morning of July 30, 1978, Trooper Bieluch of the Connecticut state police received a call in his office at the Town Hall in New Hartford from Frank Jones advising him that there had been a murder on Jones' Mountain. Jones, who is part owner of a large country estate in New Hartford, informed Bieluch that he had discovered on

the mountain the body of his nephew and related some sketchy details of what he knew of the incident. He stated that his nephew and a friend had been camping out on the mountain when they were accosted by two intoxicated people; the friend ran away and, in the morning, came to the Jones' house telling Jones what had happened and that he could not find Michael. They later discovered Michael's body.

Trooper Bieluch, who arrived at the Jones' home at around 8:30 a.m., picked up Jones and proceeded with him to the lookout, which is located near the top of Jones' Mountain and about 1.4 miles from the Jones' residence. The gravel road to the lookout is surrounded on both sides by woods and dense brush. When they arrived at the lookout they met Philip Aranow, the victim's brother, Larry Lane, a friend of Philip's, and Steven Asherman, the defendant. Bieluch saw the body of the victim, which had multiple stab wounds and was surrounded by large amounts of blood.

The trooper then proceeded to interview those who were present. He began with Philip Aranow who told him that on the previous evening he and Lane had been at the Aranow cabin, which is on the same road that leads to the lookout, when the victim and the defendant arrived on the property. After speaking briefly with them at the Kingdom Game Club, the victim and the defendant both left. At around 7:30 the next morning, his uncle, Jones, and the defendant arrived, reported to him that his brother Michael was missing, and asked him to help in the effort to find him. Lane, who was interviewed next, confirmed the account given by Philip Aranow.

Trooper Bieluch then asked the defendant what had happened. The defendant responded by saying that the night before he and the victim were walking on the road toward the lookout when they were met by two intoxi-

cated men, one of whom, he thought, was carrying a shotgun of some kind. After these two men began antagonizing and intimidating the victim and him, he pushed one of the men into the other and ran off into the brush and hid for awhile. He later resumed running through the woods, after which he stopped and fell asleep. When he awoke it was daylight, and, although he did not know where he was, he proceeded down the mountain where he came upon the home of Frank Jones. When Jones came to the door in response to the defendant's knocking, the defendant related to him the same account of what had occurred.

As the defendant was speaking, the trooper noticed several things about his appearance: He was looking down at the ground all of the time. His blue jean pants and shoes were wet and extremely soiled. The pants looked as if somebody had deliberately rubbed silt from a pond or stream on them. The entire front and sides of the pants were covered with silt while the rest of his body was very clean. The defendant was wearing glasses, which were clean and had no device to hold them in place, and he did not have any visible scratch marks or insect bite marks.

As the interview continued, these facts combined to raise in the trooper's mind serious doubts about the truthfulness of the defendant's story given the density of the brush in the area, the number of insects, and the obvious fact that whoever perpetrated the killing would probably be covered with blood or would have attempted to wash it out of his clothing or discard any stained clothing. Moreover, Bieluch also observed what, from his training and substantial experience, appeared to be dried blood caked on the corners of the defendant's mouth and detected from his mouth the foul odor of rancid blood. Finally, Bieluch observed that the defendant, who was incoherent at times and unsure of his answers to questions, appeared to be under the influ-

ence of some mind-altering drug, the symptoms of which he had seen on numerous occasions. That fact, of course, would have been consistent with the unexplained brutality of the slaying.

At this point the defendant began asking the trooper if he could go down to the Jones' house to take a shower. Trooper Bieluch advised him that he would prefer that he not leave because certain things needed to be done at the scene and that he wanted him to remain there until troopers from the Canaan barracks would arrive. The defendant, who agreed to remain, went on to respond to questions from Bieluch concerning the details of his account. When asked about his shirt, he said that it had been ripped off by the branches as he was running through the brush and that he did not know where it was.

Trooper Bieluch then asked Jones to recount what had happened. He reiterated that the defendant had come to his home that morning reporting that there had been trouble on the hill and that he could not find Michael. Jones had not been particularly concerned since he knew that the victim was familiar with the woods. Jones went on to state that when the defendant arrived at his home he was wearing no shirt and that Philip Aranow and Lane had supplied him with the yellow shirt he was then wearing.

When the defendant asked again if he could go to the Jones' house and take a shower, Trooper Bieluch suggested that he could take the defendant to the house where he could have a cup of coffee. Again, the trooper, who had substantial doubts about the veracity of the defendant's story, was concerned about alteration of the crime scene or any potential evidence before the arrival of the investigative team from Canaan and the major crime squad. The trooper, Jones and the defendant left the scene of the homicide at around 9:30 a.m.

and drove to the Jones' home in the trooper's cruiser, meeting as they arrived simultaneously three troopers from the Canaan barracks. The defendant exited the cruiser and walked across the lawn and entered the Jones' home as Bieluch began briefing Sergeant Timmons, in Trooper Calkins' presence, on what had occurred prior to his arrival. Timmons then assigned Troopers Bieluch and Bernstein, who had arrived with him, to guard the scene of the crime. They both went to the scene after which Bieluch brought Philip Aranow and Lane down to the Jones' residence. In the meantime Lieutenant Smith, commander of the Canaan barracks, and Trooper John McGoldrick arrived. Troopers Bieluch, Calkins and McGoldrick were then assigned to interview individually the witnesses Aranow, the defendant, and Lane, respectively. Bieluch gathered all three witnesses together on the closed-in porch of the home and advised them all together of their *Miranda* rights. When he asked them whether they understood their rights each one individually indicated that he was fully aware of his rights. The individual interviews then began.

There was sufficient probable cause to justify the defendant's seizure on Jones' Mountain. Thus there was no fourth amendment basis for suppressing any of the evidence obtained from him. The following information was available to Bieluch at the time he requested the defendant to remain at the scene: the victim's body was lying face down next to a pool of blood and the defendant was the last person known to have been with the victim before his death. The person who killed the victim would probably have been covered with blood as a result of the method of killing. The defendant was wearing blue jeans that were wet and soiled in front with what appeared to be silt from a nearby pond and stream. The silt appeared to have been deliberately rubbed into the pants. The remainder of the defend-

ant's body was very clean, except that what appeared to be dried blood was caked on the corners of the defendant's mouth. The foul odor of rancid blood was detected on the defendant's breath. The defendant, who claimed to have been running and stumbling through dense forest throughout a black midsummer night, nevertheless had no visible scratch marks or insect bite marks on his body. There were also no scratch marks on the glasses he was wearing. During the interview the defendant would not look at Bieluch but instead kept looking on the ground. The defendant appeared to be under the influence of some kind of mind-altering drug, a possible explanation for the brutality of the crime. Viewing this information in its totality, Bieluch had reasonable grounds to believe that the defendant had committed the murder.

II

Rulings on Evidence

A

USE OF DENTAL IMPRESSIONS

On motion of the state, Practice Book, 1963, § 2186 et seq. (now § 775 et seq.), the defendant, pursuant to court order, was compelled to permit the taking of wax impressions and photographs of his teeth. The defendant claims that the taking of these impressions and photographs violated his right, under article first, § 8 of the Connecticut constitution, not to give evidence against himself. The defendant asserts further that the use of such evidence by the state's dental expert constituted an impermissible identification procedure in violation of the due process clause of the fourteenth amendment of the United States constitution and that, in any event, the state's dental expert should not have been permitted to give an opinion concerning the probability that

the bite mark on the shoulder blade of the victim was made by the defendant because there was no factual basis for such opinion.

(1)

Connecticut's Privilege of Self-Incrimination

Article first, § 8 provides in part: "No person shall be compelled to give evidence against himself . . . ." The defendant points to the language of the fifth amendment of the federal constitution which reads that "[no person] shall be compelled . . . to be a witness against himself" and argues that because of the difference in language the protection afforded by the state constitution is broader and that by the use of the word "evidence" the state constitution was intended to cover both testimonial and nontestimonial evidence. We disagree.

The privilege against self-incrimination embodied in article first, § 8 has its genesis in the common law. Historically the privilege became part of the common law because of the experience with the oath ex officio as used originally in the ecclesiastical courts and later in the Court of the Star Chamber. 8 Wigmore, Evidence (McNaughton Rev.) § 2250. The seemingly innocuous oath which bound a person under examination to make a true answer to all questions that might be asked was used to force him to destroy himself by his own testimony. If his compelled testimony convicted him, he was punished. If he refused to take the oath, he was subjected to torture. Finally, when John Lilburn in 1637 refused to take the oath ex officio in the Star Chamber and received parliamentary support in his refusal, the principle embodied in the Latin phrase nemo tenetur seipsum accusare (no one is bound to accuse himself) had its origins and ultimately came to be accepted in the common law courts. McCormick, Evidence (2d Ed.) § 114. At common law the privilege protected against

any activity performed for the purpose of communicating. Id., § 124. Noncommunicative evidence such as fingerprints or photographs was not included within the privilege. The purpose of incorporating the privilege in our state constitution was to place this right as it was known at common law beyond legislative abolition. *State* v. *Torello,* 103 Conn. 511, 513, 131 A. 429 (1925).

The defendant argues that the difference in language between article first, § 8 of the state constitution ("[n]o person shall be compelled to give evidence against himself") and the fifth amendment of the federal constitution ("[no person] shall be compelled . . . to be a witness against himself") suggests that the two provisions should not receive the same construction. The thrust of his argument is that being a witness generally refers to giving testimony whereas giving evidence includes both testimonial and nontestimonial material. Our cases, while not focusing on the linguistic differences nevertheless have not drawn the suggested distinction. Cf. *State* v. *Anonymous (1976-2),* 32 Conn. Sup. 306, 311, 353 A.2d 789 (1976). We have approved, for example, the admission of a photograph taken of the accused; *State* v. *Hackett,* 182 Conn. 511, 516, 438 A.2d 726 (1980); the taking of paraffin casts of a defendant's hands; *State* v. *Chesney,* 166 Conn. 630, 640, 353 A.2d 783, cert. denied, 419 U.S. 1004, 95 S. Ct. 324, 42 L. Ed. 2d 280 (1974); the seizure of mud-stained shoes to compare with a plaster cast of a footprint; *State* v. *Smith,* 156 Conn. 378, 383, 242 A.2d 763 (1968); the introduction in evidence of the defendant's blood stained shoes; *State* v. *Hassett,* 155 Conn. 225, 232, 230 A.2d 553 (1967); and the use of fingerprints. *State* v. *Chin Lung,* 106 Conn. 701, 723, 139 A. 91 (1927).

We have construed the state constitutional privilege as being declaratory of the common law. *State* v. *Monahan,* 96 Conn. 289, 290, 114 A. 102 (1921). "The common-law maxim *nemo tenetur seipsum accusare* has

been incorporated in the constitutions of nearly every State and appears in our Declaration of Rights in the provision that an accused 'shall not be compelled to give evidence against himself.' Conn. Const., Article First, § 9 [now § 8]. The history of the development of the privilege discloses that the object sought to be attained thereby was the prevention of the employment of legal process to extract from the person's own lips an admission of his guilt which would then take the place of evidence." *State* v. *Ford*, 109 Conn. 490, 496, 146 A. 828 (1929). We have also noted that compulsion which makes a suspect or accused the source of real or physical evidence has been held not to violate a person's constitutional rights as it is not such as compels "communications" or "testimony"; *State* v. *Chesney*, supra; and in this respect we cited the following examples. *Cupp* v. *Murphy*, 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973) (taking scrapings from fingernails over protest); *Gilbert* v. *California*, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967); *United States* v. *Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (compelling a demonstration of the accused's voice); *Schmerber* v. *California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (withdrawing blood sample).

In our most recent discussion of the constitutional privilege against self-incrimination we made the following observation: "Judicial review of an asserted invasion of the protection against compelled self-incrimination must focus on whether the state (1) actually compelled the claimant to disclose (2) *testimonial* communications (3) which tended to incriminate him." (Emphasis added.) *State* v. *Smith*, 185 Conn. 63, 83, 441 A.2d 84 (1981). And in *State* v. *Acquin*, 187 Conn. 647, 678 n.15, 448 A.2d 163 (1982), cert. denied, U.S. , 103 S. Ct. 3570, 77 L. Ed. 2d 1411 (1983), we noted that compelling an accused to drop his pants so as to expose non-

testimonial scratches on his thigh would not violate his constitutional rights. Thus, if there is a constitutional distinction to be drawn in self-incrimination cases between giving testimony and giving evidence, our cases have not reflected it. *State* v. *Anonymous (1976-2)*, supra.

Seventeen states[2] have language in their constitutions comparable to the "giving evidence" language in article first, § 8. None of these states[3] has construed this phrase as excluding all nontestimonial evidence. Utah, which construes its provision as broader than the federal counterpart, would preclude compelling an accused to give a handwriting sample because that would require a defendant to perform an affirmative act. *Hansen* v. *Owens*, 619 P.2d 315 (Utah 1980); accord

[2] Alabama (Ala. Const., Art. I § 6); Arizona (Ariz. Const., Art. II § 10); Delaware (Del. Const., Art. I § 7); Illinois (Ill. Const., Art. I § 10); Kentucky (Ky. Const., § 11); Maine (Me. Const., Art. I § 6); Maryland (Md. Decl. of Rights, Art. 22); Mississippi (Miss. Const., Art. III § 26); Nebraska (Neb. Const., Art. I § 12); North Carolina (N.C. Const., Art. I § 23); Pennsylvania (Pa. Const., Art. I § 9); South Dakota (S.D. Const., Art. VI § 9); Tennessee (Tenn. Const., Art. I § 9); Texas (Tex. Const., Art. I § 10); Utah (Utah Const., Art. I § 12); Vermont (Vt. Const., Ch. I, Art. X); Washington (Wash. Const., Art. I § 9).

[3] See, e.g., *Hill* v. *State*, 366 So. 2d 318, 322 (Ala. 1979); *State* v. *White*, 102 Ariz. 162, 426 P.2d 796 (1967); *State* v. *Smith*, 47 Del. Super. Ct. 334, 91 A.2d 188 (1952); *People* v. *Schmoll*, 77 Ill. App. 3d 762, 396 N.E.2d 634 (1979), cert. denied, 447 U.S. 928, 100 S. Ct. 3026, 65 L. Ed. 2d 1122 (1980); *Newman* v. *Stinson*, 489 S.W.2d 826, 829 (Ky. 1972); *State* v. *O'Conner*, 320 So. 2d 188 (La. 1975); *State* v. *Buzynski*, 330 A.2d 422 (Me. 1974); *Reed* v. *State*, 35 Md. App. 472, 372 A.2d 243 (1977); *McCrory* v. *State*, 342 So. 2d 897 (Miss. 1971); *State* v. *Swayze*, 197 Neb. 149, 247 N.W.2d 440 (1976); *Wyman* v. *DeGregory*, 101 N.H. 171, 137 A.2d 512 (1957) (preserves common-law privilege); *State* v. *Strickland*, 276 N.C. 253, 260, 173 S.E.2d 129 (1970); *State* v. *Thomason*, 538 P.2d 1080, 1081-86 (Okla. Crim. App. 1975) (state constitution adopted privilege as at common law); *Commonwealth* v. *Moss*, 233 Pa. Super. 541, 334 A.2d 777 (1975); *Delk* v. *State*, 590 S.W.2d 435, 440 (Tenn. 1979); *Olson* v. *State*, 484 S.W.2d 756, 772 (Tex. Crim. App. 1972) (opinion on rehearing) ("evidence" self-incrimination clause merely reflective of common-law privilege); *State* v. *Picknell*, 142 Vt. 215, 454 A.2d 711 (1982); *Artis* v. *Commonwealth*, 213 Va. 220, 191 S.E.2d 190 (1972); *State* v. *Foster*, 91 Wash. 2d 466, 589 P.2d 789 (1979).

Creamer v. *State*, 229 Ga. 511, 192 S.E.2d 350 (1972). Utah would not preclude the use of a hair sample because that does not require an affirmative act. *State* v. *Van Dam*, 554 P.2d 1324 (Utah 1976). For our part, we agree with the observation that "there is really, in spirit and in principle, no distinction arising out of such difference of language." *Counselman* v. *Hitchcock*, 142 U.S. 547, 586, 12 S. Ct. 195, 35 L. Ed. 1110 (1892). We hold that compelling the defendant to submit to the taking of a dental impression did not violate article first, § 8 of the Connecticut constitution.

(2)

Dental Impression—Due Process

The defendant objected to the state's motion permitting it to take a dental impression of the defendant on the additional ground that the procedure violated the defendant's rights to due process in that it permitted the state to identify the defendant by means of an impermissibly suggestive procedure. The defendant's claim is that by permitting Dr. Luntz, the state's expert, to compare the teeth of the defendant with the bite mark on the victim's body, when Luntz knew the defendant was the accused, the court permitted an impermissibly suggestive identification procedure. This claim is without merit.

Expert testimony is used in a variety of situations such as a comparison of fingerprints, voiceprints and bite marks. The state correctly observes that the defendant's analogy to eyewitness identification is misconceived. "*Wade* [*United States* v. *Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)] and *Gilbert* [*Gilbert* v. *California*, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967)] fashion exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel.

A conviction which rests on a mistaken identification is a gross miscarriage of justice. The *Wade* and *Gilbert* rules are aimed at minimizing that possibility by preventing the unfairness at the pretrial confrontation that experience has proved can occur and assuring meaningful examination of the identification witness' testimony at trial." *Stovall* v. *Denno,* 388 U.S. 293, 297, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). There are substantial differences between the problems faced by an accused when confronted by identification procedures utilized by law enforcement authorities with respect to eyewitnesses and any problems which may arise from a systematized or scientific analysis of the accused's fingerprints, blood sample, clothing, hair and the like. "Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts." *United States* v. *Wade,* supra, 227–28.

(3)

Factual Basis for Dr. Luntz's Opinion

The defendant claims that the testimony of Luntz was inadmissible because there was no way of knowing the precise position of the victim's scapula at the time the bite was inflicted. We disagree.

In order to render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion. The trial court has a wide discretion in ruling on the admissibility of expert testimony and the exercise of this discretion is not to be disturbed unless it has been abused or the error is clear and involves a misconception of the law. *Going* v. *Pagani,* 172 Conn. 29, 35, 372 A.2d 516 (1976). Where the fac-

tual basis of an opinion is challenged the question before the court is whether the uncertainties in the essential facts on which the opinion is predicated are such as to make an opinion based on them without substantial value. *Berndston* v. *Annino*, 177 Conn. 41, 46, 411 A.2d 36 (1979); *Sears* v. *Curtis*, 147 Conn. 311, 314–15, 160 A.2d 742 (1960). The question is not whether the opinion would be more or less persuasive depending on the presence or absence of a given fact but rather whether the missing fact is such an essential part of the factual foundation for the opinion that its absence would rob the opinion of its persuasive force. *Maroncelli* v. *Starkweather*, 104 Conn. 419, 424, 133 A. 209 (1926).

Luntz believed that a meaningful comparison could be made between the photographs of the bite mark and the photographs and models of the defendant's teeth. He testified that after viewing the photographs that showed the bite mark he obtained life size enlargements of them. He then took impressions of the defendant's dentition and made corresponding models. He photographed the defendant's teeth and took special scan photographs inside the defendant's mouth. He then created a "mirror image" photograph of the defendant's teeth to aid the jury in comparing the bite mark photograph with the photograph of the defendant's teeth. He then conducted bite mark experiments involving the scapula, over which the skin that was bitten was located. He examined the photographs and models for the purpose of discerning the unique characteristics of the defendant's dentition and comparing those characteristics with the photographs of the bite mark.

Luntz observed from the photograph of the bite mark that there was no impression made by the biter's tooth number nine (left frontal incisor). He also noted that while teeth numbers four, seven and eight left distinct marks, tooth number nine left none and teeth numbers ten and eleven left only faint marks. He concluded that,

because every other available point of comparison between the bite mark and the defendant's dentition matched and the mark evidenced a variation of pressure on imprint, the mark was produced while the scapula was located so as to create pressure under teeth numbers four, six, seven and eight but not under nine. Although Luntz could not testify with certainty as to the precise position of the scapula at the time of the bite, this circumstance did not render his opinion inadmissible. Assuming that the position of the scapula at the time of the bite was a significant factor in making a bite mark comparison, the fact that in this case the position was unknown or unknowable would go the weight of Luntz's opinion and not to its admissibility.

B

RESTRICTIONS ON CROSS-EXAMINATION OF STATE'S EXPERTS

The defendant claims that the trial court erred in limiting his cross-examination of Luntz. Specifically the defendant asserts that he was denied an opportunity to inquire respecting Luntz's hobby of collecting a variety of police accouterments and that he was further denied the opportunity to demonstrate that on another occasion his opinion concerning bite mark identification turned out to be erroneous.

"The right of an accused to effectively cross-examine an adverse witness is embodied in the confrontation clause of the sixth amendment. *Davis* v. *Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *Douglas* v. *Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965). . . . The general rule is that restrictions on the scope of cross-examination are within the sound discretion of the trial judge . . . but this discretion comes into play only after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment." *State* v. *Gaynor*, 182

Conn. 501, 508, 438 A.2d 749 (1980). Therefore, the threshold question is whether the cross-examination of Luntz accorded to defense counsel at trial satisfied the principle enunciated in *Davis* v. *Alaska*, supra.

The defendant's avowed purpose for the inquiry into Luntz's hobby was to show his close relationship to law enforcement authorities. This inquiry cannot be examined in a vacuum. Prior to this inquiry the defendant had elicited ample evidence of Luntz's relationship with law enforcement agencies which rendered this testimony cumulative. After Luntz had testified, as part of his qualification, that he had been appointed as a Connecticut state police surgeon in 1963 and currently held this position with the rank of captain, the defendant elicited on cross-examination testimony concerning Luntz's initial involvement with the state police, his private socializing with police and attendance at police social functions and his receipt of a gift from the police department. In the light of the elicited information the additional inquiry was not only cumulative but was also of questionable relevance and, in any event, in context amounted to nothing more than evidential fluff.

Irving M. Sopher, chief medical examiner for the state of West Virginia and a forensic pathologist and odontologist, testified for the state as an expert rebuttal witness. On cross-examination the defendant sought to inquire if he and Luntz had testified in the same cases, if Luntz had referred work to him, and if he had seen Luntz over the lunch break. Upon objection all of these questions were excluded. The defendant claimed that he had a right to show the relationship of these witnesses to each other and how that relationship may affect their judgment.

Bias may consist of a friendly feeling or of hostility. It may be shown in a variety of ways. Implied bias may be shown by the relationship of a witness to a party;

this may also include an intimate family relationship to a person other than a party. 3A Wigmore, Evidence (Chadbourn Rev.) § 949. Social and business relationships depending on their nature or character, may also have a tendency to show bias. When the issue involves the relationship between a witness and a party, cross-examination of the witness to demonstrate this relationship is a matter of right which may not be unduly restricted. *Alford* v. *United States*, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624 (1931). This may also be true in many cases involving the relationship of witnesses to each other. Under the peculiar facts of this case, however, the matter involved the exercise of discretion.

Although Luntz and Sopher were both on the prosecution team their roles were different. Luntz supported the prosecution theory that the defendant had perpetrated the homicide by identifying the bite mark on the victim's shoulder blade as having been made by the defendant. Sopher's testimony, on the other hand, was offered to rebut the testimony of the defendant's experts, the main thrust of which was that the defendant's teeth could not have produced the bite mark in question. It was Sopher's opinion that the defendant could not be excluded as the biter. Upon objection by the defendant Sopher was precluded from testifying whether in his opinion the defendant had actually bitten the decedent.

The defendant's claim was that Luntz and Sopher were part of the same team and that as such one tended to testify consistently with the other. That being so, the defendant argues, he had a right to show the social and business relationship that may have played a role in producing this symbiotic testimonial result. Had Sopher supported Luntz's opinion that the bite mark had been caused by the defendant there is no question but that it would have been appropriate for the defendant to have shown the social and business relationship

between the two in relation to their joint testimony in this and other cases. Even in this case where the testimonial connection is more attenuated the trial court would have been well advised to have exercised its discretion in favor of permitting the inquiry. But on the facts of this case we cannot conclude that the ruling constituted an abuse of the court's discretion. In Luntz's opinion the evidence ruled the defendant in. In Sopher's opinion the evidence did not rule the defendant out. Although in a general sense Sopher's testimony supports Luntz it is much too oblique to warrant as a matter of right the implied bias inquiry based on the relationship of the two expert witnesses.

In determining whether the cross-examination of Sopher was unduly restricted it is the entire cross-examination which we must examine. *State* v. *Wilson*, 188 Conn. 715, 720, 453 A.2d 765 (1982). When the examination is measured against this standard we cannot conclude that the defendant's rights were violated. The examination of Sopher's qualifications covered more than twenty-nine pages of transcript and covered such matters as Sopher's knowledge of bite mark analysis techniques, the extent to which he had been informed about other witness' testimony, the accuracy of the molds and photographs he had prepared and the accuracy of his analysis generally. He was also confronted with his own testimony in an Illinois case in which both he and Luntz had testified for the prosecution, testimony which appeared to contradict views he was expressing in the case on trial. The defendant on cross-examination was permitted to paint a sufficient picture of Sopher so as to permit the jury to pass on his credibility.

III

Hair and Blood Samples

The trial court admitted into evidence a strand of hair which had been removed from the defendant's key

ring.[4] At the time of seizure what appeared to be blood was found on the strand of hair and on the key ring. Agent Michael Malone of the FBI laboratory, an expert in the examination of hair and fibers, identified the hair as being that of the victim on the basis of twenty characteristics which matched the known hair of the victim. The amounts of blood on both the key ring and the hair were too small for complete analysis. The blood on the key ring was identified as human blood but could not be typed. The blood on the hair could not be otherwise identified. Both blood samples were entirely consumed in testing.

The defendant moved to strike the hair and key ring exhibits and the testimony relating thereto on the grounds that there had been material alteration in the exhibits from the time of seizure and that the consumption of the blood sample during testing was prejudicial to the defendant because it deprived him of an opportunity to defeat the inference that the hair was deposited on the key ring at the time of Michael Aranow's death.

A

ALTERATION OF EVIDENCE

When proffered evidence is challenged on the ground of material alteration, the trial court must satisfy itself in reasonable probability that the substance has not been changed in important respects. The trial court, in making its determination, must consider the nature of the article, the circumstances surrounding its preservation and custody and the likelihood of intermeddlers tampering with it. In the absence of a clear abuse of discretion the ruling of the trial court admitting the evidence must stand. *State* v. *Piskorski*, 177 Conn. 677, 697, 419 A.2d 866, cert. denied, 444 U.S. 935, 100 S. Ct. 283, 62 L. Ed. 2d 194 (1979).

[4] State's Exhibit JJJ consists of a rectangular key ring and a set of 12 keys.

BEST AVAILABLE COPY

The defendant claims that the hair which was received by Agent Malone at the FBI laboratory was changed in that it was broken at the proximal end, that is, the side near the scalp. Malone, a hair and fiber expert, testified that he received the hair in a sealed package which contained a key ring and set of keys wrapped in a piece of paper. He removed the items from the package and upon examination noted that a hair fragment was embedded in encrusted blood on a key ring.[5] Despite its broken condition, Malone was able to test the hair and to identify twenty matching characteristics between the hair fragment and the known hair of the victim. In the absence of a showing that the broken condition of the hair sample would have destroyed or distorted its use for identification purposes, there was no basis for its exclusion as evidence.

B

CONSUMPTION OF BLOOD SAMPLES BY TESTING

The defendant argues that the trial court erred in denying his motion to strike evidence relating to blood found on the key ring and hair. His claim is that the test which culminated in establishing the substance as blood also consumed the entire substance discovered and in the process not only deprived the defendant of

[5] Although the defendant makes the additional claim that there was a material discrepancy with respect to where the hair was found, this discrepancy is not sufficient to justify the exclusion of the evidence. It is undisputed that a key ring containing a set of keys was seized from the defendant, that these items were wrapped in a plain piece of paper and placed in a sealed package, that the sealed package was delivered to Agent Spalding by Trooper White, that Spalding turned the sealed package over to Agent Malone who opened the package, removed the various items and made his observations. While it is true that both Troopers Terry and Raposa testified that they had observed a hair embedded in encrusted blood on a key instead of on the key ring, the discrepancy is one of observation, memory, or description. Since it is clear that the hair was found embedded in dry blood on one of the items seized from the defendant, the precise location of the hair goes to the weight of the evidence rather than to its admissibility.

the opportunity of presenting evidence[6] on his own behalf but by introducing the results of the tests denied him a fair trial.

A fair trial is implicit in the term "due process of law." "The requirements of due process are met in the trial of a person accused of crime if he has been given the benefit of a fair and impartial trial in accordance with the settled course of judicial proceedings in this state." *Wojculewicz* v. *Cummings,* 145 Conn. 11, 19, 138 A.2d 512, cert. denied, 356 U.S. 969, 78 S. Ct. 1010, 2 L. Ed. 2d 1075 (1958). Whether the defendant, under the facts of the present case, has been deprived of his right depends upon the materiality of the missing evidence, the likelihood of mistaken interpretation of it by witnesses or the jury, the reason for its nonavailability to the defense and the prejudice to the defendant caused by the unavailability of the evidence. *State* v. *Hamele,* 188 Conn. 372, 381, 449 A.2d 1020 (1982); *State* v. *Harden,* 175 Conn. 315, 327, 398 A.2d 1169 (1978).

"The state is under an affirmative duty to disclose to a defendant any evidence that is favorable to him and material to his guilt or innocence. [*Brady* v. *Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)]. The duty to disclose includes a duty to preserve evidence prior to trial. . . . In order to show a violation of the constitutional right set forth in *Brady,* a defendant must demonstrate, to the extent possible under the circumstances, that the evidence is both favorable and material to an element of his defense . . . . The scope of the required showing of favorableness is gauged against what it would be possible to show under the circumstances. . . .

[6] In a pretrial motion for discovery the defendant requested production of tangible objects including key rings, hair samples and blood samples in order to have reasonable tests made.

"Thus, where evidence sought to be disclosed has been functionally destroyed, but was subjected to scientific testing by the state prior to its destruction, a defendant must show that a retest would have been possible and must challenge the state's test results, either by attacking the manner in which the test was conducted or by other evidence. . . . On the other hand, if the state has not tested an item of evidence before its loss or destruction, and no other facts indicate that test results might have proved unfavorable to the defendant, little more is required than a showing that the test could have been performed and results obtained which, in the context of the defendant's version of the facts, would prove exculpatory. . . . If a due process violation is established, the trial court must take whatever action is reasonably necessary to prevent prejudice to the defendant." (Citations omitted.) *State* v. *Kersting*, 50 Or. App. 461, 623 P.2d 1095, 1103–1104 (1981).[7]

That the blood samples tested by the state were material is beyond dispute. The fact that a fragment of the victim's hair was found embedded in human blood on the defendant's key ring was highly inculpatory. The defendant does not question the results of the state's test, namely, that the substance on the key ring was human blood and the substance on the hair was blood. Nor does he contend that the destruction was deliberate. *United States* v. *Beltempo*, 657 F.2d 472, 479 (2d Cir.), cert. denied, 457 U.S. 1135, 102 S. Ct. 2963, 73 L. Ed. 2d 1353 (1982). His chief complaint is that if he had had an opportunity to test the samples he might have been able to establish that the blood on the key

[7] We agree with *Kersting* that in cases where destruction of evidence is likely during the testing, questions concerning the deprivation of due process rights would be substantially obviated if the state adopted a procedure to notify the defendant that tests are about to be conducted thereby giving the defendant an opportunity to arrange for his expert to be in attendance. *State* v. *Kersting*, 50 Or. App. 461, 623 P.2d 1095, 1104 n.4 (1981).

ring and the hair was not the blood of the deceased and that such evidence would have defeated the inference that the hair was deposited at the time of the decedent's death. The rationale for this theory was that the defendant and the decedent were close friends who spent much time together and that both were medical students and as such were exposed to clinical blood. The difficulty with the defendant's claim is that it is unsupported. The defendant offered no evidence nor made any offer of proof that the amounts of blood on the key ring and the hair were sufficient, if properly tested, to establish blood type. In the absence of such evidence or offer the defendant's claim was speculative. Furthermore, the defendant does not challenge the state's assertion that the testing of the samples necessarily consumed each sample. In the circumstances we cannot conclude that the defendant has been denied a fair trial.

IV

Evidence of Prior Unrelated Offense

While the defendant was at the New Hartford Town Hall to give a statement to the troopers investigating the homicide, he was asked by Trooper Terry whether in the course of the previous evening he or the victim had consumed any alcohol or drug of any kind. Over the objection of the defendant, Terry testified that the defendant had responded by saying that he and the victim "had smoked some marijuana on the way down from New York." Thereafter, at the defendant's request, the court gave an instruction to the jury cautioning them that, if they believed this testimony they were not to consider it as bearing adversely on the defendant's character and should not be prejudiced against the defendant by reason of it; rather, it could be considered by them only to the extent they believed it to be relevant to the issues in the case. The defendant took no exception to the cautionary instruction.

The defendant told part of his story to a number of people. The first person the defendant saw when he came down from the mountain on the morning of July 30, 1978, the day after the murder, was Frank Jones. Jones, on noting the defendant's apparently drugged or intoxicated state asked the defendant whether he had been on drugs or drinking to which the defendant responded that he thought they (he and the victim) had "had a few beers." Later that morning the defendant told Trooper Terry that, on the trip from New York to New Hartford the night before, he and the deceased had smoked marijuana but "no hard stuff."

Although these two accounts were not necessarily contradictory in that the response to Jones referred to what the defendant and the victim were doing on Jones' Mountain whereas the statement to Trooper Terry referred to what had transpired during the trip to New Hartford, their significance is more readily apparent when viewed in context. The what, the when, the where and the how of a sequence leading up to an event may sometimes reveal the who and the why.

A spectacular incident such as a murder is not merely a snapshot of an event fixed in time. To be understood it must be viewed as part of a sequence both before and after its occurrence. The events leading up to the brutal assault on Jones' Mountain help to place the ultimate crime in its proper setting. Since the defendant was at the very least a supporting actor in these events his description of what occurred assists the trier in defining his role. Since, by his own account, the defendant was the last known person to have seen the victim alive and since he and the deceased had been together for a considerable period of time before the murder, the defendant's story takes on added significance. Upon careful analysis the account may assist in determining whether the defendant was a feature actor in the murder drama or merely a bit player.

The murder was brutal. The victim had been subjected to numerous stab wounds and had been bitten on his shoulder blade. The murder appeared to have been perpetrated by someone who was mentally or emotionally agitated probably while under the influence of mind-altering drugs. Jones noted that the defendant appeared to be under the influence of drugs or alcohol. Trooper Bieluch, who observed the defendant a few hours later, noticed that he appeared to be under an altered state of consciousness, apparently drug related. In context the defendant's statement to Jones can be regarded as a cover-up. His later admission to Trooper Terry that he had smoked marijuana but no hard stuff on the trip from New York might also suggest that he was attempting to cover up the fact that he may have ingested more than a few beers on the mountain.

Evidence of other misconduct, although ordinarily not admissible to prove the bad character of the accused may be allowed for the purpose of proving, inter alia, such things as intent, motive, identity, malice or a system of criminal activity. *State* v. *Williams,* 190 Conn. 104, 107–108, 459 A.2d 510 (1983). That such evidence tends to prove the commission of other crimes by the accused does not render it inadmissible if it is otherwise relevant and material. *State* v. *Ibraimov,* 187 Conn. 348, 352, 446 A.2d 382 (1982). "Where such evidence is offered in proof of an issue in the case, and not merely to show an evil disposition on the part of the accused, the trial court must still consider whether its prejudicial tendency outweighs its probative value before ruling upon its admissibility." Id. Since the admission of such evidence involves judicial discretion our review is limited to whether this ruling exceeded the latitude accorded to the exercise of such discretion. Id. The bounds of discretion were not exceeded in this respect.

V

Extreme Emotional Disturbance

At the request of the state and over the objections of the defendant the trial court charged the jury on the lesser included offense of manslaughter in the first degree predicated on the defendant's having committed the homicide under circumstances showing extreme emotional disturbance. General Statutes § 53a-55 (a) (2).[8] The grounds of the defendant's objection are that there was an insufficient evidential basis for the submission of this crime to the jury and that the illustration given to the jury for their consideration of this case was legally inappropriate.

At the outset the state suggests that we need not review this assignment because the jury returned a general verdict. The state argues that the trial court submitted the manslaughter issue to the jury not only under the extreme emotional disturbance subsection but also under subsection (a) (1) which covers situations in which an accused "[w]ith intent to cause serious physical injury to another person . . . causes the death of such person," that there was sufficient evidence to convict under this subsection, that the defendant could have requested the court to inquire of the jury under which subsection they were basing their verdict; *State* v. *Carter*, 189 Conn. 611, 629, 458 A.2d 369 (1983); and that by failing to do so the defendant has failed to pre-

[8] "[General Statutes] Sec. 53a-55. MANSLAUGHTER IN THE FIRST DEGREE: CLASS B FELONY. (a) A person is guilty of manslaughter in the first degree when: . . . (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection . . . ."

sent this court with an adequate record to review his claim; see *Kaplan* v. *Kaplan*, 186 Conn. 387, 388 n.1, 441 A.2d 629 (1982); and therefore we should not speculate on which subsection the jury relied.

In *State* v. *Marino*, 190 Conn. 639, 650–51, 462 A.2d 1021 (1983) we stated, "[w]here a person may have been convicted under more than one statutory alternative, the judgment cannot be supported unless the evidence was sufficient to establish guilt under each statutory provision which the trier may have relied upon." Since *Marino* involved an indictment for murder under which a three judge panel convicted the defendant of manslaughter in the first degree with a firearm, General Statutes § 53a-55a,[9] without specifying under which subsection of General Statutes § 53a-55 (the statute involved in this case) the defendant was found to have committed the manslaughter, the ruling in *Marino* is applicable here. See *State* v. *Reid*, 193 Conn. 646, A.2d (1984). We must therefore review the defendant's claim about the sufficiency of the evidence with regard to extreme emotional disturbance.

Extreme emotional disturbance is not an element of the crime of murder. *State* v. *Elliott*, 177 Conn. 1, 5, 411 A.2d 3 (1979); *People* v. *Patterson*, 39 N.Y.2d 288, 383 N.Y.S.2d 573, 347 N.E.2d 898 (1976). It is, how-

[9] "[General Statutes] Sec. 53a-55a. MANSLAUGHTER IN THE FIRST DEGREE WITH A FIREARM: CLASS B FELONY: ONE YEAR NOT SUSPENDABLE. (a) A person is guilty of manslaughter in the first degree with a firearm when he commits manslaughter in the first degree as provided in section 53a-55, and in the commission of such offense he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, rifle or other firearm. No person shall be found guilty of manslaughter in the first degree and manslaughter in the first degree with a firearm upon the same transaction but such person may be charged and prosecuted for both such offenses upon the same information.

"(b) Manslaughter in the first degree with a firearm is a class B felony for which one year of the sentence imposed may not be suspended or reduced by the court."

ever, a mitigating circumstance which will reduce the crime of murder to manslaughter. *State* v. *Elliott*, supra, 9. In an indictment for murder, under General Statutes § 53a-54a, the defendant may raise extreme emotional disturbance as an affirmative defense,[10] in which case the burden is on the defendant to establish this defense by a preponderance of the evidence. General Statutes § 53a-12 (b); *State* v. *Zdanis*, 182 Conn. 388, 390, 438 A.2d 696 (1980), cert. denied, 450 U.S. 1003, 101 S. Ct. 1715, 68 L. Ed. 2d 207 (1981); *State* v. *Elliott*, supra, 6.

Under General Statutes § 53a-55 (a) (2)[11] manslaughter predicated on the mitigating circumstance of extreme emotional disturbance is a lesser included offense of murder. See *State* v. *Rodriguez*, 180 Conn. 382, 404, 429 A.2d 919 (1980). Under § 53a-45 (c) the "jury before which any person indicted for murder is tried may find him guilty of homicide in a lesser degree than that charged." It follows that in any murder prosecution the issue of the lesser included offense of manslaughter under § 53a-55 (a) (2) may be raised either by the defendant by way of an affirmative defense or by the state where it is warranted by the evidence. Thus although in a given homicide the state may, in good faith and where circumstances reasonably warrant, assume that an accused acted with the most culpable state of mind, where the evidence is reasonably susceptible of another conclusion the jury should not be bound by that assumption and forced by its verdict to choose only between the offense with the most culp-

[10] To raise this defense requires no special plea, notice or other formal assertion by the defendant. *State* v. *Marino*, 190 Conn. 639, 651 n.11, 462 A.2d 1021 (1983).

[11] The situation which we discuss above is to be differentiated from the case of a prosecution initiated by the state under the same subsection. In the latter case the state need only prove the elements of murder because the statute specifically provides that extreme emotional disturbance need not be proved.

able state of mind and acquittal. Id. Given the existence of the requisite mitigating circumstance and compliance with the lesser included offense conditions set out in *State* v. *Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980), failure to give a requested instruction on the lesser included manslaughter offense would limit the jury's function of determining the degree of homicide contrary to § 53a-45 (c). In enacting this manslaughter statute the legislature intended to allow the finder of fact the discretionary power to mitigate the penalty of murder when presented with a situation which, under the circumstances, appears to them to have caused an understandable weakness in one of their fellows. *People* v. *Casassa*, 49 N.Y.2d 668, 680, 427 N.Y.S.2d 769, 404 N.E.2d 1310, cert. denied, 449 U.S. 842, 101 S. Ct. 122, 66 L. Ed. 2d 50 (1980).[12] The fact that the defendant may rely on the mitigating circumstance as an affirmative defense to murder does not mean that by his contrary election he may also circumscribe the homicide offenses which the jury may consider.

The evidence, necessarily circumstantial; *State* v. *Rodriguez*, supra; is sufficient to support a conviction of manslaughter in the first degree under circumstances of extreme emotional disturbance. The facts that the victim's body contained more than 100 stab wounds and a bite mark made by the defendant, that the defendant had not had much sleep during the time preceding the killing, that on the morning of the killing he was so clearly under the influence of some drug or alcohol, that persons who had never seen him before came to that conclusion, and that he appeared to be in a tense and agitated state would tend to show that

[12] Because the Connecticut penal code has been modeled after its New York counterpart we have derived sustenance from the New York decisions interpreting its code. *State* v. *Elliott*, 177 Conn. 1, 4-5, 411 A.2d 3 (1979).

the defendant was motivated by more than just a desire to take life. Taking all of these facts into account the jury would have been justified in concluding that the defendant committed the homicide at a time when he was extremely emotionally disturbed.

A

PUTATIVE "HEAT OF PASSION" ILLUSTRATION

In discussing extreme emotional disturbance the trial court commented: "The classic example of such cases are [sic] when the husband returns home to find his wife making love to a stranger and then kills one or both of them. I recall nothing in the events of this nature but remember, it is your recollection that counts, not mine." The defendant argues that the example of a "hot-blood" killing is not an appropriate example of an extreme emotional disturbance as defined by Connecticut law. We do not completely agree.

To find that a homicide has been committed under circumstances of extreme emotional disturbance the trier of fact must find that: (a) the emotional disturbance is not a mental disease or defect that rises to the level of insanity as defined by the penal code; (b) the defendant was exposed to an extremely unusual and overwhelming state, that is, not mere annoyance or unhappiness; and (c) the defendant had an extreme emotional reaction to it, as a result of which there was a loss of self-control, and reason was overborne by extreme intense feeling, such as passion, anger, distress, grief, excessive agitation or other similar emotions. *State* v. *Zdanis*, 182 Conn. 388, 390–91, 438 A.2d 696 (1980), cert. denied, 450 U.S. 1003, 101 S. Ct. 1715, 68 L. Ed. 2d 207 (1981). Although a homicide influenced by an extreme emotional disturbance is not one which is necessarily committed in the "hot blood" state but rather can be one brought about by a significant mental trauma that caused the defendant to brood for a

long period of time and then react violently, seemingly without provocation; *State* v. *Elliott,* 177 Conn. 1, 7-8, 411 A.2d 3 (1979); nothing that we said in *Elliott* would preclude a trier from finding a hot blood homicide to have occurred under extreme emotional disturbance. As we pointed out in *Elliott,* at p. 10, a charge that limits extreme emotional disturbance to the "hot blood" stage is erroneous because it is too narrow. It thus precludes a trier from convicting a defendant of the lesser degree of homicide. If despite or because of the "hot blood" charge a defendant is convicted of manslaughter instead of murder he cannot be heard to complain.

B

PRESUMED INTENT

The defendant claims that the effect of the trial court's instruction that "[e]very person is presumed to intend the natural and necessary consequences of his or her acts" was either to create a conclusive presumption of intent under certain circumstances or to shift to the defendant the burden of persuasion and that in either event this instruction denied to the defendant a fair trial. *Sandstrom* v. *Montana,* 442 U.S. 510, 524, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). The charge[13] in this case, when examined in context, is no different from similar charges which we have examined in the

[13] "Now, intent is a mental process. The person's intention may be inferred from his conduct. Every person is presumed to intend the natural and necessary consequences of his or her acts. It is often impossible and never necessary to prove criminal intent by direct evidence. Ordinarily, intent can be proved only by circumstantial evidence, as I have explained that term to you. What a person's purpose or intention has been is necessarily very largely a matter of inference. A person may take the stand and testify directly as to what his or her purpose or intention was, and that testimony you can believe or not according to whether or not it warrants belief, but no witness can be expected to come here and testify that he looked into another person's mind and saw therein a certain purpose or intention. The only way in which a Jury can determine what a person's purpose or inten-

past. In those cases we have found no basis for reversible error when the trial court defined the presumption in permissive terms and left it to the jury to decide whether the state had proven intent beyond a reasonable doubt. *State* v. *Miller*, 186 Conn. 654, 668, 443 A.2d 906 (1982) (and cases cited therein). Upon examination of the challenged instruction we find no basis for reaching a different result in the present case.

VI

Juror Misconduct

The defendant moved for a new trial on a number of grounds, two of which he has pressed on appeal. These are two instances of juror misconduct, one involving the use of a dictionary definition of "inference," the other concerning the use of nonevidential material in conducting an experiment during deliberations. After a hearing the trial court denied the motion on both grounds. We find no error.

A motion for a new trial is addressed to the sound discretion of the trial court and is not to be granted except on substantial grounds. *Bernier* v. *National Fence Co.*, 176 Conn. 622, 628, 410 A.2d 1007 (1979). If the motion is based on juror misconduct "[t]he rule extracted from the cases seems to be, that however improper such conduct may have been, yet if it does

tion was at a given time, aside from that person's own testimony, is by determining what that person's conduct was and what the circumstances were surrounding his conduct, and from those infer what his or her purpose or intention was. To draw such an inference is not only a privilege, but it is also the duty of the Jury provided, of course, the inference drawn is a reasonable one. In this case, therefore, it will be part of your duty to draw all reasonable inferences from the conduct of the accused in the light of the surrounding circumstances as to what purpose or intention was in his mind at various times.

"In order for the accused to be found guilty of the charge of murder, you must find beyond a reasonable doubt that he had an intent to cause the death of Michael Aranow. If you do not find proven beyond a reasonable doubt that the accused had that intent, then he is not guilty of murder."

not appear that it was occasioned by the prevailing party, or anyone in his behalf; if it [does] not indicate any improper bias upon the juror's mind, and the court cannot see, that it either had, or might have had, an effect unfavorable to the party moving for a new trial; the verdict ought not to be set aside." *Pettibone* v. *Phelps*, 13 Conn. 445, 450 (1840); *State* v. *Watkins*, 9 Conn. 46, 51 (1831).

Juror misconduct which results in substantial prejudice to the defendant is not to be tolerated. But not every irregularity in a juror's conduct compels reversal. "The dereliction must be such as to deprive the defendant of the continued, objective and disinterested judgment of the juror, thereby foreclosing the accused's right to a fair trial." *Nelson* v. *United States*, 378 A.2d 657, 660 (D.C. 1977); *United States* v. *Fay*, 238 F. Sup. 1005, 1007 (S.D.N.Y. 1965). Consideration of extrinsic evidence is presumptively prejudicial because it implicates the defendant's constitutional right to a fair trial before an impartial jury. *State* v. *McCall*, 187 Conn. 73, 80 444 A.2d 896 (1982). A presumption of prejudice may also arise in cases involving communications between a juror and third persons. *Remmer* v. *United States*, 347 U.S. 227, 74 S. Ct. 447, 98 L. Ed. 650 (1954) (attempted jury tampering); *Aillon* v. *State*, 168 Conn. 541, 547–48, 363 A.2d 49 (1975) (ex parte communication between judge and juror). But unless the nature of the misconduct on its face implicates his constitutional rights the burden is on the appellant to show that the error of the trial court is harmful. *Aillon* v. *State*, supra, 547; *State* v. *L'Heureux*, 166 Conn. 312, 323, 348 A.2d 578 (1974).

A

USE OF DICTIONARY DEFINITION OF "INFERENCE"

The trial court found that during the deliberations Juror Streib read a definition of the word "inference"

which he had copied from a Funk & Wagnall dictionary. The definition as read to the jury is as follows: "Item 1, that which is inferred; a deduction or conclusion; Two, the act or process of inferring; Three, loosely a conjecture . . . ; Four, is the comprehensive term for the formal drawing of conclusions; it includes both induction and deduction. Deduction is the inferring of a universal or general rule from instances. Deduction is the reverse process of drawing a conclusion as to a particular instance from general premises." The definition particularly objected to is "loosely, a conjecture."

To begin with, the definition of words in our standard dictionaries is taken as a matter of common knowledge which the jury is supposed to possess. *Dulaney* v. *Burns,* 218 Ala. 493, 119 So. 21 (1928). Therefore the fact that one juror tells another juror what the other juror is supposed to know does not qualify to raise a presumption of prejudice. Prejudice must be demonstrated. *Shultz* v. *State,* 417 N.E.2d 1127 (Ind. App. 1981). In this case the claim of prejudice is that the jury might have believed that in drawing inferences they were entitled to rely on guess, surmise or conjecture. The trial court, pointing out that its charge to the jury was lengthy and complete on the word "inference" and that the jury asked that the part of the charge involving circumstantial evidence and inference be repeated, could find no such prejudice and neither can we. Not only did the court give the jury the customary instruction that they must accept the law from the court but during the discussion of inferences cautioned that "[t]he inference you draw, however, must not be a guess or surmise upon the evidence but must be from a fact which the evidence has established. Inferences that you may draw from these established facts must be logical and reasonable and well-founded upon the facts which have [been] proven in the trial of the case." In the absence of a clear indication to the contrary, we must

presume that the jury followed this instruction. *State* v. *Griffin*, 175 Conn. 155, 160, 397 A.2d 89 (1978).

We hasten to add that the fact that we have found no error in this case does not mean that a trial judge is authorized to furnish a dictionary to a jury upon their request. There may be situations where furnishing a dictionary to a jury may create a presumption of prejudice arising out of injecting unauthorized informational and definitional material into the jury instructions; *State* v. *Holmes*, 17 Ore. App. 464, 522 P.2d 900 (1974); but that is not this case.

B

EXPERIMENT BY JURORS IN DELIBERATION ROOM

The defendant claims that it was prejudicial for Juror Turner surreptitiously to bring into the jury room a belt and shirt, not introduced into evidence as exhibits, and to utilize these articles in an experiment in which one juror tried to lift another juror lying prone on the floor and carry him five or six feet. The defendant maintains that the introduction of articles not admitted into evidence and their use in conducting an experiment denied the defendant his right to test the evidence or to question the premises, the methods or the results of the experiment and that such actions of the jury constitute a denial of the defendant's rights of confrontation, of counsel and of cross-examination and also denied him a fair trial.

After hearing the evidence on the defendant's motion, the trial court found that the jury conducted the experiment to test the state's claim that a single person such as the defendant could have lifted the victim and carried him several feet, and that the experiment was suggested by the activities of the defendant's counsel and his investigator in reenacting part of the same experiment in the courtroom before the jury. The

court further found that the items which were brought into the jury deliberating room, a shirt and a belt, were common everyday items which practically every male wears, and that the experiment was conducted in a manner that has reasonably been consistent with the testimony presented to the jury and merely tested the credibility of that testimony. The trial court concluded that the state had proved beyond a reasonable doubt that any misconduct of the jury in this regard was harmless and without prejudice to the defendant. We agree.

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner* v. *Louisiana*, 379 U.S. 466, 472–73, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). "The problems presented by an experiment conducted by jurors on their own defy precise, systematic analysis. A juror is expected to draw upon his general knowledge and experience in deciding the case, and he is encouraged to participate in full and robust debate and deliberations with his fellows in reaching a verdict. However, he should not consider facts relating to the case unless introduced at trial under constitutional and legal safeguards . . . . Accordingly, when a juror passes beyond the record evidence in reaching a decision, whether a new trial will be granted depends upon the magnitude of the juror's deviation from his proper role, the degree to which the accused was deprived of the benefits of the constitutional and statutory safeguards, and the likelihood that the impropriety influenced the jury's verdict. All of these elements must be weighed in determining whether there is a reasonable possibility that the

defendant's right to a fair trial has been prejudiced." *State* v. *Graham*, 422 So. 2d 123, 132 (La. 1982).

That it was inappropriate for Juror Turner to bring the shirt and belt into the deliberating room for experimental purposes is beyond dispute. But in themselves neither item proved anything. Moreover, the experiment was not designed to test whether the victim's body had in fact been moved. It was apparent from an examination of the area that there was a primary and secondary crime scene at the lookout and that the body had been lifted five and one-half to six feet from the primary to the secondary scene. Thus the question posed to the jury by the defendant's challenge to the state's theory about how the crime had been committed was whether it was likely that the defendant could have carried the victim from one place to the other because the victim outweighed him by some fifteen pounds. In the experiment the juror who played the role of the victim outweighed the lifting juror by some nineteen pounds. Thus the situations were comparable. Indeed, the defendant does not challenge the reliability of the experiment for the limited purpose for which it was used. Although the victim was not wearing a belt, the reason a belt was used by the jury can be explained by the fact that when the defendant's attorney had his investigator play the role of the victim in a partial demonstration before the jury, the investigator was wearing a belt. Since the jury were well aware not only of the limited purpose of the experiment but also of the fact that the belt was being used to avoid the possibility of ripping the pants of the victim-juror the possibility that the jury could have been influenced by the use of a belt in the experiment is remote. Nor does the defendant contend otherwise. In the circumstances, the trial court's finding that the jury experiment was not

prejudicial to the defendant not being clearly erroneous, its denial of the defendant's motion for a new trial on the ground stated cannot be disturbed.

The cases cited by the defendant are distinguishable. With one possible exception which we discuss infra they all have one thing in common, namely, the unauthorized introduction into the deliberating process of a new evidential fact. *Bulger* v. *McClay,* 575 F.2d 407 (2d Cir. 1978) (unauthorized discovery of defendant's address which was located at some distance from the crime scene and therefore tended to discredit his excuse for being at a particular bus stop near the scene of the crime); *Durr* v. *Cook,* 442 F. Sup. 487 (W.D. La. 1977) (jury foreman reenacted the homicide outside of the jury room and reported the results to his fellow jurors); *People* v. *Holmes,* 69 Ill. 2d 507, 372 N.E.2d 656 (1978) (several members of jury made independent investigation of a type of shoe claimed to be worn by the assailant); *People* v. *Brown,* 48 N.Y.2d 388, 423 N.Y.S. 2d 461, 399 N.E.2d 51 (1979) (juror conducted independent test of visibility, using motor vehicle different from that described in the evidence and reported results to the jury); *People* v. *Crimmins,* 26 N.Y.2d 319, 310 N.Y.S. 2d 300, 258 N.E.2d 708 (1970) (jury made unauthorized visit to the neighborhood of the crime scene).

In *United States* v. *Beach,* 296 F.2d 153 (4th Cir. 1961), a perjury case, the defendant had testified before the grand jury that he did not know that certain men were using a certain room in a certain home, that he had not seen one of the men in the home and that he had not heard certain machinery in the home. The men were evidently connected with a numbers operation and had put in their rented room certain adding machines at which they worked for several hours daily. After the jury retired to consider their verdict, they sent back a message requesting the court to send them an elec-

tric drop cord. The defense attorney was then absent from the courtroom. The court had an electric drop cord delivered to the jury and so advised the defense counsel on his return to the courtroom. The defense counsel objected on the ground that the jury obviously wanted the cord in order to test the amount of noise made by the running of the adding machines. The machines had been introduced in evidence and sent to the jury in the jury room. However, when being operated as part of the numbers operation each machine sat on a foam rubber pad two inches thick. The padding had been removed from the machines when the machines were introduced into evidence and was separately introduced. Because of the possibility that the jury might conduct the experiment without the padding and, therefore, under conditions dissimilar to the circumstances which existed where the numbers operation was being carried on, the fourth circuit reversed. Although there are some similarities between *Beach* and the present case, the significance of the experiment in *Beach* to the issues in the case and the greater risk of prejudice involved in that case also distinguishes it from the case at bar.

Even were we to conclude that there was a reasonable possibility of prejudice from the use of the belt in the experiment, the other circumstantial evidence so overwhelmingly points to the defendant's guilt of manslaughter in the first degree that the trial court was correct in concluding that any error created by juror misconduct was harmless beyond a reasonable doubt.

There is no error.

In this opinion the other judges concurred.

APPENDIX L

O R D E R

THE MOTION OF THE DEFENDANT, STEVEN M. ASHERMAN, FILED ON JULY 26, 1984, FOR REARGUMENT, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,

FRANCIS J. DRUMM, JR.
CHIEF CLERK

SEPTEMBER 26, 1984

(3)

Office-Supreme Court, U.S.
FILED
FEB 15 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-853

In The

Supreme Court Of The United States

NOVEMBER TERM, 1984

STEVEN M. ASHERMAN,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the jury's consideration of a dictionary definition of the word "inference" during jury deliberations violated the petitioner's due process right to a fair trial.

2. Whether the jury's performance of an experiment, which introduced into the case no new evidential fact, was conceded below to have been reliable, and was suggested by the conduct of defense counsel at trial, violated the petitioner's due process right to a fair trial.

3. Whether the trial court's instructions to the jury violated this court's holding in the case of Sandstrom v. Montana, 442 U.S. 510 (1979).

4. Whether the limitations placed by the trial court on cross-examination of two state's witnesses violated the petitioner's confrontation and due process.

5. Whether there was sufficient evidence to support the jury's verdict.

6. Whether the consumptive testing performed by the State denied the petitioner his right to due process of law.

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STATEMENT OF THE CASE

On April 29, 1980, the petitioner was convicted of manslaughter in the first degree in the stabbing death of Michael Aranow. The facts upon which the conviction rests are set out in the opinion of the Connecticut Supreme Court:

> On a Saturday evening, July 29, 1978, the defendant and the victim, who were both students at the Columbia Medical School, traveled from the victim's family home in Hastings-on-Hudson, New York, to New Hartford, Connecticut, to take a break from work on a school computer project. They arrived in New Hartford at the country estate of the victim's family between 9:00 and 9:30 p.m. As they drove to the Kingdom Game Club, which adjoins the estate, the victim's brother, Philip, noticed the lights of their automobile from the cabin in which he and a friend, Robert Lawrence Lane (Larry Lane), were staying and decided to find out who was entering the property. They drove to the game club and met the defendant and the victim.
>
> The four young men exchanged greetings and introductions, after which the victim told his brother that he and the defendant were going to the lookout at the top of Jones' Mountain and that they might see them later

that night at Philip's cabin. Because it was a particularly "buggy" night, Philip offered to them some insect spray. The four parted, but neither the defendant nor the victim went to Philip's cabin later that night.

The defendant and the victim proceeded to walk through the woods about one mile until they reached the lookout. Because the night was so dark, the victim had to lead the defendant by the hand. When they arrived at the lookout some unexplained emotion or circumstance, induced perhaps by a mind-altering drug, led the defendant to slay the victim brutally by stabbing him with a knife over 100 times in the face, back, buttocks and left leg, and slashing his throat. Some of the wounds were inflicted post-mortem. The defendant also bit the victim on the upper left portion of his back, over the scapula.

The defendant then attempted to hide the body by moving it, but succeeded in moving it only five and one-half to six feet. He left the scene, covered with blood, looking for some place where he could wash the blood off his clothing. As he walked through the woods, he hid somewhere the knife that he had carried to the scene in a "day pack" and the shirt he was wearing, which was drenched in blood, and came upon a stream or nearby pond, where he attempted to wash the blood from the rest of his clothing. He also smeared silt and dirt all over the front of his jeans.

After day broke, on Sunday morning, he walked down to the home of the victim's uncle, Frank Jones. Jones was awakened at 7:30 a.m. by the defendant's shouts at the front door and the barking of Jones' dogs. Coming to the door in his pajamas, Jones found the defendant, stripped to the waist, clad in blue jeans that were soaking wet. The defendant, who was obviously tense, told Jones that he and the victim had been in the woods when they encountered "two guys with a gun." He had escaped but could not find the victim, and wanted to call the police and the victim's parents right away. Jones, who knew that his nephew was familiar with the woods, wanted to find out more before getting excited and calling the police or the Aranows.

After the defendant mentioned the victim's name, Jones let him into the house. The defendant asked for a drink of water and asked also if he could wash his hands, which he was permitted to do at the kitchen sink. Jones noted that, while the defendant wore no shirt, he had no bruises or insect bites anywhere on the exposed part of his body. He could also observe that the defendant appeared to be on drugs or to have been drinking. In response to Jones' questions about the matter, the defendant said that he thought he and the victim had had a couple of beers.

The defendant went on to tell Jones that the night before, he and the victim were walking to a place on the top of the mountain, where there was a

view, when they were approached by two drunken men, one of whom had a gun. According to the defendant, the men asked the victim and him for something, after which the defendant shoved the man with the gun into the other, and he and the victim ran off into the woods.

Jones and the defendant then proceeded in Jones' automobile up Steele Road and onto Henderson Road to Philip Aranow's cabin in order to see if Michael was there. At the cabin, the defendant requested and was given a shirt to wear. He began to give additional details about what had happened the night before, saying that he had seen a knife one of the men had; that one of the men chased him through the woods for a long time; and that his shirt had been lost as he ran through the woods. The defendant kept repeating that they should call the police. He then went by car with Philip Aranow and Larry Lane to the victim's car and the Kingdom Game Club. Having parked Philip's car on the road to the lookout, they proceeded on foot towards the lookout. Jones had taken his car and gone back down Henderson Road and Steele Road to his home and then up the mountain from the opposite direction.

As the three young men approached the lookout, the defendant, who had been calling out for the victim, fell back from the other two. Jones approached from the other direction and saw the body of the victim lying face down at the lookout. He approached the body while the three

young men remained on the dirt road, tried to find a vital sign, and when he did not, told the others that Michael was dead. Frank Jones left the three young men near the lookout as he went to call the police.

Trooper Joseph Bieluch was the first officer to arrive and hear the defendant's explanation. He noted that the defendant's jeans were extremely dirty and wet, as if smeared with silt from a pond. His jogging shoes were also wet, though his hands and arms were clean. He was wearing his glasses and had no apparent bug bites, scratches or cuts. He had a red substance in the corners of his mouth, which appeared to be blood, and Bieluch detected the foul smell of rancid blood. The trooper believed that the defendant was under the influence of something.

. . .

Later, the defendant was asked to reduce his statement to writing at the New Hartford Town Hall. There, Troopers Robert Terry and Richard Raposa saw spots on the defendant's blue jeans that appeared to be blood. When asked to empty his pockets, the defendant produced a key ring on which a red hair, similar to the victim's, was embedded in blood. The defendant, who was surprised to see the blood and hair, wanted to know how long it would take the lab to determine whether or not it was blood. When Sergeant Henry DesChamps later asked the defendant to describe the assailants, he merely

shrugged his shoulders and gave no answer.

During the interview at Town Hall, Sergeant DesChamps asked the defendant if he had killed the victim. The defendant paused for a few moments and, looking down, said "no." Before he left the New Hartford Town Hall, he shook hands with DesChamps, thanked him for the way he had treated him, and promised to come back some day and tell him what had happened on the hill.

The investigation of the scene began upon discovery of the body and continued for a number of days thereafter. An expert in crime analysis testified that there was no sign of a struggle on the small path leading to the lookout or at the nearby road, but that there was a primary and secondary crime scene at the lookout, and that the body had been lifted five and one-half to six feet from the primary to the secondary scene. He also stated that there would have been no way for two men to drag or otherwise force the victim onto the lookout over the small path without creating some disturbance to the path or the vegetation surrounding it.

Expert dog track evidence was presented by Trooper Andrew Rebmann who handled the bloodhound "Clem." . . . The track demonstrated that the victim had never run from any assailant, but proceeded directly to the lookout.

A wide-ranging search of Jones' Mountain by the state police and over one hundred volunteers with metal detectors, failed to yield evidence that would substantiate the defendant's story. All the ponds were searched by Connecticut state police divers without yielding evidence of the crime.

The mountain, as depicted in state's exhibits A, D, X, and Y, was a rugged area of deep, thick woods and full underbrush.

Agent Robert Spalding, of the FBI laboratory, testified that human blood was found in the knees and surrounding front area of the defendant's blue jeans and was especially apparent on the front inside portion of the jeans. . . .

Other expert testimony indicated that the hair on the key ring originated from the head of the victim and had been embedded in human blood on the defendant's key ring. Finally, Dr. Lester Luntz, a forensic odontologist, testified, after exhaustive comparative analysis that, to a "reasonable degree of dental certainty," the bite mark on the victim's back had been inflicted by the defendant's teeth.

On the basis of this evidence, the defendant was convicted of manslaughter in the first degree; General Statutes § 53a-55; and was sentenced thereon to a prison term of not less than seven years nor more than fourteen.

State v. Asherman, 193 Conn. 695, 697-704, 478 A.2d 227 (1984).

The petitioner appealed his conviction to the Connecticut Supreme Court, which by unanimous decision, affirmed the judgment. Id. at 697. It also rejected the petitioner's motion to reargue, which was followed by this petition for a writ of certiorari.

I. THE PETITIONER HAS NOT MADE A SUBSTANTIAL CLAIM THAT HE WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL BY ANY JUROR MISCONDUCT THAT OCCURRED BELOW OR THAT SUCH A CLAIM IS OTHERWISE WORTHY OF REVIEW

A. Facts Relating To the Petitioner's Claim

During the course of jury deliberations, one juror read to the others a definition of the word "inference" that he had copied from a Funk & Wagnall dictionary. The definition read to the jury follows:

> Item 1, that which is inferred; a deduction or conclusion; Two, the act or process of inferring; Three, loosely a conjecture . . .; Fourth, is the comprehensive term for the formal drawing of conclusions; it includes both induction and deduction. Deduction [sic] is the inferring of a universal or general rule from instances. Deduction is the reverse process of drawing a conclusion as to a particular instance from general premises.

Petitioner's App. at 127A. The definition that the petitioner particularly objects to is "loosely, a conjecture."

Another juror brought into the jury room a belt and a shirt, not introduced into evidence as exhibits, in order to use these items in an experiment in which one juror tried to lift another juror lying prone on the floor and carry him five or six feet. The purpose of the experiment, suggested by the conduct of defense counsel during the course of the trial, was to test the plausibility of the State's theory of the case, as well as that proffered by the

petitioner. Petitioner's Brief at 128A, 130A.

B. The Conduct Complained Of Did Not Deprive the Petitioner Of A Fair Trial

The Connecticut Supreme Court's careful treatment of the petitioner's claim discloses that the defendant's right to a fair trial was not violated.[1] The Court first observed that juror misconduct deprives a criminal defendant of a fair trial when it results in "substantial prejudice." Petitioner's App. at 126A. In the absence of conduct that by its nature would create a presumption of prejudice; see, e.g., Remmer v. United States, 347 U.S.

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[1] Although the defendant claims that several constitutional rights were violated by the alleged juror misconduct, Petitioner's Brief at 14, 18, 20, 22-23, these various formulations of his claim are properly subsumed by the fair trial guarantee implicit within the due process clause. See Smith v. Phillips, 455 U.S. 209, 219 (1982) (prosecutorial misconduct resulting in non-disclosure of potential juror bias analyzed under fair trial guarantee of due process clause).

227 (1954) (evidence that juror had been offered a bribe); the burden of proving the existence of prejudice, said the court, would rest on the defendant. See Smith v. Phillips, 455 U.S. 209, 215-18 (1982) (claim of juror bias); United States v. Hill, 688 F.2d 18 (6th Cir. 1982) (dictionary in jury room); Petitioner's App. at 126A.

With respect to the jury's exposure to the dictionary definition of inference, the Connecticut Supreme Court found no possible prejudice to the defendant based on the following factors: (1) the definition of words used in standard dictionaries is taken as a matter of common knowledge which the jury is supposed to possess; (2) the instructions to the jury, which emphatically cautioned against the drawing of inferences based simply upon a "guess or surmise," amply guarded against the use by the jury of anything but "logical and reasonable

[inferences] well-founded upon the facts" proved. Petitioner's App. at 127A (quoting instructions given); and (3) there was no evidence in the record to rebut the presumption that the jury obeyed these instructions. Petitioner's App. at 127A-128A. A colorable claim that reference to the dictionary definition resulted in the deprivation of a fair trial cannot arise from these facts.

The petitioner's claim with respect to juror experimentation also fails to raise a substantial federal claim worthy of review by this Court. That is so for several reasons: (1) Although the juror conduct was properly disapproved by the Connecticut Supreme Court, it clearly did not involve introduction of any "new evidential fact" into the case; Petitioner's App. at 129A-131A; (2) the experiment tested the theories of the parties and was well within the

bounds of the evidence introduced at trial; Petitioner's App. at 129A, 131A; (3) the experiment was itself suggested by a similar demonstration conducted by defense counsel during the course of the trial; Petitioner's App. at 128A-129A; (4) no claim was made at trial or on appeal that the experiment was somehow intrinsically, or as conducted, unreliable.[2] Petitioner's App. at 130A.

Hence this record cannot support a substantial claim that the experimentation deprived the petitioner of a fair trial. See United States v. Callahan, 442 F. Supp. 1213, 1225-26 (D. Minn. 1978); State v. Thompson, 524 P.2d 1115, 119-20 (Mont. 1974); People v. Harris, 84 App. Div. 2d 63,

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[2] Nevertheless, in his petition, the petitioner claims for the first time in any court that, because the items used in the experiment "differed substantially form the evidence," the experiment was "unreliable." Petition at 26. This claim, factually unsupported, is not appropriate for review, not having been made below. See Hoover v. Ronwin, ___ U.S. ___, 104 S. Ct. 1989, 1998 n.25 (1984); Illinois v. Gates, ___ U.S. ___, 103 S. Ct. 2317, 2321-22 (1983).

445 N.Y.S.2d 520, 546 (2d Dep't 1981); People v. Kurena, 187 Ill. App. 3d 771, 410 N.E.2d 277 (1980). This is especially so in light of the other circumstantial evidence that "so overwhelmingly point[ed] to the [petitioner's] guilt." Petitioner's App. at 132A (opinion of the Connecticut Supreme Court). Cf. Rushen v. Spain, __ U.S. __, 104, S. Ct. 453, 456-57 (1983) (harmless judicial misconduct). Juror misconduct that does not undermine the reliability of the jury verdict simply does not jeopardize the fair trial guarantee. Cf. Smith v. Phillips, 455 U.S. 209, 220-21 (1982) (prosecutorial misconduct).

II. THE PETITIONER'S SANDSTROM CLAIM IS FRIVOLOUS

The petitioner claims that the trial court's instruction that "[e]very person is presumed to intend the natural and necessary consequences of his or her acts" had the

effect of either creating a conclusive presumption of intent or shifting to the petitioner the burden of persuasion on the issue of intent, in violation of the holding of Sandstrom v. Montana, 442 U.S. 510, 524 (1979). But this Court has emphasized that such an instruction violates the Sandstrom holding only when the instruction, viewed with the surrounding language, is cast in mandatory, and not permissive terms. Id. at 517; Ulster County Court v. Allen, 442 U.S. 140, 157 (1979).

Examination of the instructions given here establishes the presumption's permissive and non-mandatory nature. See T. August 7, 1979, at 39-40 ("intention may be inferred from his conduct"; what a person's intention has been is "necessarily very largely a matter of inference"; [t]o draw such an inference is not only a privilege, but it is also the duty of the jury provid-

ed, of course, the inference drawn is a reasonable one"; jury has a "duty to draw all reasonable inferences").

Under the circumstances, no real claim under Sandstrom v. Montana, supra, is tenable here.

III. THE PETITIONER'S CLAIM THAT HIS OPPORTUNITY TO CROSS EXAMINE TWO STATE'S WITNESSES WAS UNCONSTITUTIONALLY RESTRICTED IS ENTIRELY FACT LADEN AND UNIQUE TO THIS CASE, AND FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION

The petitioner seeks review of a claim that he was deprived of his confrontation rights when he was prevented at trial from posing several questions to two expert witnesses who testified for the State. One expert witness testified that the bite mark located on the victim's shoulder blade had been made by the petitioner. The other witness testified, in the State's case on rebuttal, that the petitioner could not be

excluded as the person who bit the victim. Petitioner's App. at 110A. The petitioner sought to inquire about (1) one witness' hobby of collecting police accoutrements, thus attempting to show his close relationship to law enforcement authorities; (2) a professional and social relationship between the two witnesses; and (3) the accuracy of the opinion of one witness in another case. Petitioner's App. at 718-19.

As to the first claim, the Connecticut Supreme Court accurately pointed out that the witness' close relationship to the State Police, including his then status as state police surgeon with the rank of captain, had been amply demonstrated by other evidence. Petitioner's App. at 719. The court rejected the second claim on the ground that, while evidence of a relationship between witnesses might have some probative value on the issue of credibility, the

matter would fall within the discretion of the trial court. Petitioner's App. at 220. Given the difference between the testimony of the two witnesses and the ample opportunity the petitioner had to test the reliability of the testimony given, the Supreme Court found neither a constitutional violation nor an abuse of discretion. Petitioner's App. at 111A. The claim to the contrary is without persuasive force.

Finally, the petitioner claims that under the confrontation clause of the Sixth Amendment, he was entitled to ask questions of one expert that would have revealed that his opinion was erroneous in another case. The defendant, who failed to make an offer of proof, as required by state law; see State v. Gooch, 186 Conn. 17, 24, 438 A.2d 867 (1982); never established that the prior opinion was in fact erroneous. Moreover, the inquiry would clearly have required a

lengthy excursion into speculative and collateral matters and may well have resulted in a trial within a trial. The Sixth Amendment does not require such a result. Instead, examination of all of the cross-examination discloses that the jury was given ample basis for testing the reliability of the witness. See Davis v. Alaska, 415 U.S. 308 (1974).

At a minimum, these are fact-laden and unique claims, the review of which would not at all advance the jurisprudential role of this Court. See United States v. Johnston, 268 U.S. 220, 227 (1925) (Holmes, J.) (this Court does not grant certiorari "to review evidence and discuss specific facts").

IV. THERE WAS AMPLE EVIDENCE TO SUPPORT THE JURY'S DECISION TO MITIGATE THE CRIME PROVED FROM MURDER TO MANSLAUGHTER, AND THE QUESTION PRESENTED WAS, IN ANY EVENT, EITHER NOT PROPERLY RAISED BELOW OR IS NOT APPROPRIATE FOR REVIEW BY THIS COURT

The petitioner claims that the jury ought not to have been instructed on the lesser included offense of murder, murder under extreme emotional disturbance, which is classified as manslaughter in the first degree. See Conn. Gen. Stat. § 53a-55(a)(2) (Rev. to 1979). One aspect of the claim, that there was insufficient evidence of extreme emotional disturbance, involves a question of state law and is entirely without basis. The other, that the instruction deprived the petitioner of equal protection of the laws, was never raised below.

While the due process clause requires that there be sufficient evidence of every element of an offense; see Jackson v.

Virginia, 443 U.S. 307, 316 (1979); the interpretation of the elements of a state statute is a question of state law. See Wainwright v. Goode, __ U.S. __, 104 S. Ct. 378, 382 (1983). Thus, it is for the Supreme Court of the State of Connecticut to define the parameters of "extreme disturbance" as that term is used in Conn. Gen. Stat. § 53a-55(a)(2) (Rev. to 1979). This the Court has done. See State v. Elliot, 177 Conn. 1, 7-10, 411 A.2d 3 (1970). Its conclusion that the evidence was sufficient to permit the jury to mitigate the seriousness of the crime charged cannot be impeached.[3]

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[3] As the Connecticut Supreme Court noted:

> The facts that the victim's body contained more than 100 stab wounds and a bite mark made by the defendant, that the defendant had not had much sleep during the time preceding the killing, that on the morning of the killing he was so clearly under the influence of some drug or alcohol, that persons who had never seen him before came to that conclusion, and that he appeared to be in a tense and agitated state would tend to show that the defendant was motivated by more than just a desire to take life. Taking all of these facts into

The petitioner further claims that he was deprived of the equal protection of the laws because a defendant raising his extreme emotional disturbance as an affirmative defense to a charge of murder must provide prior notice to the State; Conn. Prac. Bk. §§ 758, 759 (1978); while the trial court may, at the State's request and without prior notice by the State, instruct the jury on the mitigated crime of manslaughter (murder under extreme emotional disturbance) where the evidence warrants. As the petitioner acknowledges, however; Petition at 13; this claim was mentioned for the first time in the State courts in a motion to reargue, filed after final judgment in the Connecticut Supreme Court. The Court summarily rejected that motion.

> account the jury would have been justified in concluding that the defendant committed the homicide at a time when he was extremely emotionally disturbed.

Petitioner's App. at 122A-123A.

The petitioner's failure to comply with the fundamental and virtually universal rule of appellate procedure that requires parties to identify and brief the claims they seek to make on appeal is without excuse. See Conn. Prac. Bk. §§ 3063, 3060F; Sachem's Head Ass'n v. Lufkin, 168 Conn. 365, 366, 362 A.2d 519 (1975) (failure to brief issue constitutes abandonment). This Court will not issue a writ of certiorari to review claims not properly raised below. Hoover v. Ronwin, __ U.S. __, 104 S. Ct. 1989, 1998 n.25 (1984); Illinois v. Gates, __ U.S. __, 103 S. Ct. 2317, 2321-22 (1983). Moreover, the Connecticut Supreme Court's summary rejection of the claim made in the motion to reargue may properly be sustained on alternate, independent state grounds: failure to comply with the state rules of

court. Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978).[4]

V. THE CONSUMPTIVE TESTING, WHICH OCCURRED PRIOR TO THE PETITIONER'S ARREST, DID NOT DEPRIVE HIM OF ANY DUE PROCESS RIGHTS

The petitioner's final claim is that the testing of blood found on his key ring, which consumed the sample, deprived him of a fair trial and the right to present evidence, protected under the due process

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[4] This claim is also insubstantial on the merits. Where the defendant raises his extreme emotional disturbance as an affirmative defense to a murder charge, it is appropriate for the State to be given advance notice so that it might be prepared to rebut the claim. Where, on the other hand, the affirmative defense is not raised but the evidence adduced at trial would nevertheless support such a finding, it is not so much the State's adversarial interest that is served by submission of the appropriate manslaughter instruction (murder under extreme emotional disturbance); it is, rather, the search for the truth and a verdict that reflects the truth that compels submission of the charge. Moreover, a defendant's extreme emotional disturbance can be the predicate of both an affirmative defense and a lesser included offense; State v. Asherman; Petitioner's App. at 121A; it is clear that the charge of the greater offense, murder, includes within it notice of the lesser offense. Any further notice would be superfluous. There is, under the circumstances, no equal protection violation.

clause of the fourteenth amendment. In resolving this claim, the Connecticut Supreme Court acknowledged the affirmative duty of the State to disclose to a defendant any evidence favorable to him and material to his guilt or innocence. Brady v. Maryland, 373 U.S. 83 (1963); Petitioner's App. at 114A. It went on to adopt the following test with respect to evidence that has been consumed in testing by the State:

> [W]here evidence sought to be disclosed has been functionally destroyed, but was subjected to scientific testing by the state prior to its destruction, a defendant must show that a retest would have been possible and must challenge the state's test results, either by attacking the manner in which the test was conducted or by other evidence.

Petitioner's App. at 115A. Cf. California v. Trombetta, __ U.S. __, 81 L. Ed. 2d 413 (1984) (evidence is material only when it "possesses an exculpatory value that was apparent before the evidence was destroyed,"

and when it is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means").

The standard applied by the Connecticut Supreme Court to the challenged unavailability of evidence necessarily consumed in testing comports with constitutional safeguards. Cf. California v. Trombetta, supra (unnecessary destruction of breath sample following testing by State did not constitute due process violation under the circumstances). Absent some substantial evidence that would impeach the test results, a defendant would simply obtain the windfall suppression of reliable evidence if the rule the petitioner advances were applied. Legitimate protections against the introduction of unreliable evidence would not be involved, since the record would have to establish the reliability of the testing

process, while the truth seeking function of a trial would be severely undermined.

The petitioner failed to satisfy the applicable standard. He never even claimed, much less demonstrated, that a retest would have been possible. That the sample was necessarily consumed in testing was simply never challenged below. Petitioner's App. at 116A. Nor did the petitioner challenge the testing methods used, the competency of the examiner, or even the results of the test. Moreover, the petitioner, who would have sought to establish only that the blood was not that of the victim, offered no evidence to show that the amounts of blood on the key ring were sufficient, if properly tested, to establish blood type.[5] Petitioner's App. at 116A. Under the circumstances,

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[5] The State's test results showed only that the substance on the key ring was human blood. Petitioner's App. at 115A.

the petitioner's claim has no support.[6] See State v. Herrera, 365 So. 2d 399, 401 (Fla. App. 1978) ("the weight of authority in the country is that the destruction of [evidence] unavoidably consumed during chemical testing by a state chemist does not constitute an act of suppression of evidence by the state sufficient to trigger a due process violation"); accord, State v. Atkins, 369 So. 2d 389, 390 (Fla. App. 1979); Partain v. State, 238 Ga. 207, 232 S.E.2d 46-47 (1977); Poole v. State, 291 So.2d 723, 725-26, (Miss. 1974); See v. State, 511 P.2d 1076, 1077 (Alaska 1973); State v. Lightle, 210 Kan. 415, 502 P.2d 834, 836 (1972); see also State v. Clutier, 302 A.2d 84, 89 (Me. 1973).

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[6] While consumptive testing should be performed by the State with notice to the defendant and an opportunity for him to have his expert present, such procedure would only be used when the testing follows the initiation of the defendant's prosecution, which did not occur here. See Conn. Prac. Bk. § 732-38.

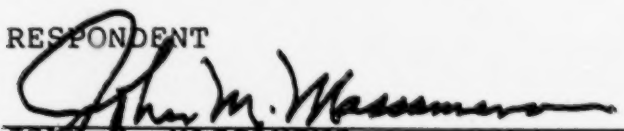
CONCLUSION

For the foregoing reasons, the State of Connecticut urges this Court to deny the petition for a writ of certiorari.

Respectfully submitted.

THE STATE OF CONNECTICUT

RESPONDENT

By: 

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